UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS. 00-10376-GAO,
00-10384-GAO and 00-12541-GAO
(consolidated)

EDMUND F. BURKE,
Plaintiff,

v.

TOWN OF WALPOLE, et al.,
Defendants.

ORDER GRANTING PENDING
MOTIONS FOR SUMMARY JUDGMENT
January 22, 2004

O'TOOLE, D.J.

This Order resolves all pending motions for summary judgment.

1. Adoption of Magistrate Judge's Recommendations

The following motions for summary judgment had been referred to Magistrate Judge Cohen for hearing and his report and recommendation: (i) motion of Lowell Levine (# 214) (#15 in Docket No. 00-10384-GAO); (ii) motion of Town of Walpole, Joseph Betro, Richard Stillman, Steven P. Kenney, William Bausch, and James J. Dolan (# 217); and (iii) motion of Gerard Mattaliano, Kevin Shea, Stephen McDonald, Scott Jennings, and Lisa Buckley (# 256). After hearing, the Magistrate Judge filed a Report and Recommendation with respect to each motion (## 275, 279, and 278 respectively). He further filed a Supplement to Reports and Recommendaitons (#283). In due course, the plaintiff filed an "Omnibus Objection" to the recommendations as they pertained to the following defendants: Lowell Levine, Stephen McDonald, Kevin Shea, James Dolan, William

Bausch, Richard Stillman, Joseph Betro, and the Town of Walpole (# 282). No objection was made to the recommendations as they pertained to Steven P. Kenney, Scott Jennings, Lisa Buckley, or Gerard Mattaliano. The plaintiff further filed an objection to the Magistrate Judge's Supplement (# 284).

After careful review of the parties' submissions and of the Magistrate Judge's reports, I accept and approve the reports and adopt the recommendations that the motions be granted. Accordingly, the summary judgment motions identified above are all GRANTED substantially for the reasons set forth by the Magistrate Judge in the respective reports.

2. Motion of Kathleen Crowley

After the Magistrate Judge had filed his reports with respect to the motions identified above, the defendant Kathleen Crowley moved for summary judgment as to the remaining claims asserted against her (# 291). (Some of the claims asserted against her had been dismissed on a prior motion.) The plaintiff submitted an opposition to Crowley's motion.

After careful review of the motion, opposition, and the parties' supporting papers, I conclude that, because of the similarity of the parties' contentions to those advanced with respect to the other motions, as well as the parties' reliance on similar parts of the summary judgment record presented with respect to the other motions, it is not necessary or expedient either to refer the motion for hearing to the Magistrate Judge or to hold a hearing myself. I am satisfied that Crowley's motion ought to be, and it hereby is, GRANTED, substantially for the reasons set forth in her memorandum in support of the motion at parts B, C, and E.

In particular, I conclude that the plaintiff lacks admissible evidence sufficient to permit a rational factfinder to conclude that any act or omission by Crowley was the cause of any actionable

harm to him, especially including any harm flowing from his arrest and detention or from a search of his property. The plaintiff's theories against this defendant are long on supposition and rhetoric, but wholly lacking in factual evidentiary support. The warrants were supported by probable cause, so there was no deprivation of any constitutional or other federal right, but even if probable cause was absent, there is nothing in the record to establish that Crowley was responsible in any way for such a lack. As to the state law claims, I accept the defendant's argument that she has the benefit of absolute immunity to the extent that her putative liability would be predicated upon information communicated by her to the police in the course of an active investigation in which judicial proceedings were expected. See Correllas v. Viveiros, 572 N.E.2d 7 (Mass. 1991). I also agree that the summary judgment record lacks evidence sufficient to enable the plaintiff to sustain any of the state claims on their merits. Because her second immunity argument (in Part D of her memorandum) is redundant of the absolute immunity argument, I find it unnecessary to resolve that issue.

3. Conclusion

The pending motions for summary judgment (## 214, 217, 256, and 291) are all GRANTED, and judgment shall enter in favor of the moving defendants as to all claims in the Third Amended Complaint.

It is SO ORDERED.

January 22, 2004
DATE

\s\ George A. O'Toole, Jr.
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
00-10376-GAO
00-10384-GAO
00-12541-GAO

EDMUND F. BURKE

Plaintiff

v.

TOWN OF WALPOLE, ET AL.

Defendants

REPORT AND RECOMMENDATION
ON DEFENDANTS TOWN OF WALPOLE, JOSEPH BETRO,
STEPHEN P. KENNEY, WILLIAM BAUSCH, AND JAMES DOLAN'S
MOTION FOR SUMMARY JUDGMENT

October 8, 2003

COHEN, M.J.

This is a civil rights case with pendent state law claims. The action is brought against some seven named Massachusetts State Police Officers, various and sundry "John Does", "Other Officials of the Commonwealth of Massachusetts", the Commonwealth of Massachusetts, the Town of Walpole, police officers from the Town of Walpole, and

various forensic examiners, including defendants Crowley, Kessler, Evans, and Levine[1] in Civil Action No. 00-10384-GAO.[2]

Generally speaking,[3] the underpinnings of this case began with the murder of one Irene Kennedy in Walpole, Massachusetts. The crime scene search indicated that Mrs.

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[1] This and the related cases have a rather tortuous procedural history. Plaintiff initially commenced suit against the Town of Walpole, certain police officers of the Town of Walpole, and Dr Levine, in the Norfolk County Superior Court. That action was removed to this court on motion of the Town of Walpole and Town of Walpole Police Officers under Civil Action No. 00-10376-GAO. Sometime later, in that same state court action, defendant Levine filed a similar notice of removal to this court. Instead of being consolidated, then and there, with Civil Action No. 00-10376-GAO, that removal was docketed as Civil Action No. 00-12541-GAO. In the meantime, plaintiff brought direct suit (*i.e.*, not a removed action) against various Massachusetts State Police Officers and the Commonwealth of Massachusetts under Civil Action No. 00-10384-GAO. On a later occasion, all of the cases were consolidated under 00-10376-GAO, and subsequent amendments to the pleadings (including an amended complaint, a second amended complaint, and a third amended complaint) have been made under Civil Action No. 00-10376-GAO.

Plaintiff has also brought suit against a forensic dentist employed by the Massachusetts Medical Examiner (Dr. Kathleen M. Crowley) and two others (Kessler and Evans) in the Massachusetts Medical Examiners Office. Those claims were brought under Civil Action No. 00-10376-GAO after consolidation. The action brought against Dr. Lowell Levine was brought, as previously indicated, under Civil Action No. 00-10384-GAO, as a removed action. In Civil Action No. 00-10376-GAO, defendants Crowley, Kessler and Evans, filed a motion to dismiss. That motion, in turn, was referred to this court for report and recommendation under the provisions of Rule 2(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts. This court issued a report and recommendation on that motion on or about May 15, 2003 (adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, (G.L. c. 12, § 11(H)), and this court has also issued a report and recommendation on the motion to dismiss and/or for summary judgment brought by defendant Levine. Indeed, the latter report and recommendation involved, in many respects, the same factual findings and legal conclusions as are presented in this motion, and this court, rather than reinvent the wheel for no purpose whatsoever, borrows heavily, often verbatim, from the report and recommendation issued with respect to the motion for summary judgment filed by Dr. Levine.

The remaining defendants (*e.g.*, the Town of Walpole and various and sundry Walpole Police Officers in Civil Action No. 00-10384-GAO and 00-12541-GAO) have also filed motions for summary judgment. With the exception of the motion to dismiss filed by the Commonwealth of Massachusetts (which was continued on account of the unavailability of counsel for the Commonwealth), this court heard all other motions on the same day as it did with respect to the motion referred to in this Report and Recommendation. A Report and Recommendation as to the motions filed by the Town of Walpole and its police officers will follow this report and recommendation in a separate report and recommendation, as will a report and recommendation on the motion to dismiss filed by the Commonwealth of Massachusetts.

[2] The original complaint in Civil Action No. 00-10384-GAO, remains the current complaint. Plaintiff has, however, twice amended his complaint in Civil Action No. 00-10376-GAO, and the current complaint in that case is the Third Amended Complaint.

[3] A more detailed description of the material undisputed facts as found by this court are set forth where relevant to the issues raised by the motion and opposition thereto. In all respects, the general background facts, as well as the findings of material undisputed facts, made herein mirror those set forth in the report and recommendation on defendant Lowell Levine's motion to dismiss and/or for summary judgment entered previously hereto.

Kennedy had multiple stab wounds, from which she died. A possible bite mark was observed on her breast, and photographs of that bite mark were made. At some point during the investigation, investigators of the Massachusetts State Police focused their investigation towards the plaintiff, Edmund F. Burke. Plaintiff voluntarily provided certain forensic materials to the State Police, and voluntarily provided a dental impression to Dr. Crowley, then (and now) a forensic dentist assigned to the Medical Examiner's Office of the Commonwealth of Massachusetts. That dental impression, in turn, together with the photographs of the bite mark found on Mrs. Kennedy's breast, was forwarded to Dr. Lowell Levine (hereinafter "Levine" or "Dr. Levine"). Dr. Levine opined that the dental impressions voluntarily given to Dr. Crowley by plaintiff matched the bite marks observed on the body of the victim, Mrs. Kennedy. Based on that, and other information, the Massachusetts State Police, by and through the offices of the District Attorney, applied for and received an arrest warrant for the plaintiff. Plaintiff was subsequently arrested, and was held in custody. Thereafter, at or about the same time, a forensic DNA examination was conducted in a State of Maine laboratory, and that DNA examination apparently cast doubt on the contention that Burke murdered Kennedy.[4] Based on a *nolle prosequendum* filed some forty days thereafter by the District Attorney, plaintiff was released from custody.

[4] This conclusion by the Maine laboratory was brought to the attention of the initial arraignment judge in the state court on December 11, 1998, the day after plaintiff's arrest. Notwithstanding that, the district judge ordered plaintiff held without bail.

At bottom, insofar as relevant here, plaintiff alleges that the conduct of all of defendants, including the defendant police officers of the Town of Walpole,[5] caused his improper arrest, continued detention, and search of his premises, in violation of his Fourth Amendment rights and Fifth Amendment rights (Counts 1, 3, and 13). He also alleges pendent state law claims, including defamation.

Defendants herein (Town of Walpole, Betro, Stillman, Bausch, and Dolan), the later four all members of the Town of Walpole Police Department, and defendants in Civil Action Nos. 00-10384-GAO and 00-12541-GAO, have filed a motion for summary judgment (# 217) contending, among other things, that the undisputed material facts show that their conduct did not violate any rights of the plaintiff, constitutional or otherwise. And, to the extent that plaintiff's claims against them sound in civil rights claims, these defendants further contend that they are entitled to, at the very least, qualified immunity.

I. Material Undisputed Facts vis a vis Claims These Defendants

To the extent that plaintiff brings claims against defendant Town of Walpole and its named police officers, this court finds the following material facts to be undisputed:[6]

1. All of the defendant Walpole Police Officers, together with a number of State Police Officers, were assigned sundry and various duties in connection with the investigation of the murder of Irene Kennedy;

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[5] Joseph Betro is the Chief of Police in Walpole. Defendants Stillman, Kenney, Bausch, and Dolan are also police officers in the Town of Walpole who participated in the investigation of the murder of Irene Kennedy.

[6] Other undisputed material facts, more specific to particular claims, will be set forth in the discussion of those particular claims.

2. During the course of the investigation of the death of Irene Kennedy, photographs of a bite mark on Mrs. Kennedy's breast were taken, and plaintiff provided the police with his dentition;

3. Dr. Lowell Levine was and is a leading forensic dentist[7] with a practice in New York State. As a forensic dentist, he has examined "thousands and thousands" of dentitions.[8] He was and is a diplomate and a fellow of the American Board of Forensic Odontology (hereinafter "ABFO"),[9] being one of the founding diplomates of the ABFO.[10] And because of his experience Dr. Levine was retained by the Norfolk County District Attorney's office to give an opinion as to the origin of the bite mark on Ms. Kennedy's breast;

4. On or about December 6, 1998, based on that which had been provided to him, including plaintiff's dentition, Dr. Levine opined that, as of that date, he was unable to positively state to a reasonable degree of scientific certainty that plaintiff was the source of the bite mark.

5. Thereafter, Dr. Levine was provided with additional photographs of the bite marks found on Mrs. Kennedy's breast. Based on these photographs, Dr.

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[7] Indeed, on one occasion, the expertise of Dr. Levine was sought by Jeffrey Denner, Esq., who represented the plaintiff in the underlying criminal case, and who serves as counsel for plaintiff in this case. Plaintiff's Statement Per Local Rule 56.1 Submitted on Behalf of Edmund Burke (# 228, ¶ 11) (hereinafter "Plaintiff's Statement of Undisputed Facts"), Exhibit C, p. 28. Exhibit C includes the deposition of Dr. Levine taken by counsel plaintiff, and is hereinafter referred to as the "Levine Deposition".

[8] Levine Deposition, p. 41.

[9] Plaintiff's Statement of Undisputed Facts. ¶ 11.

[10] Levine Deposition, p. 42.

Levine opined with a reasonable degree of scientific certainty[11] that plaintiff caused the bite marks on Ms. Kennedy's breast.

6. State Police officer Steven McDonald was advised by Dr. Levine that, in his [Levine's] opinion, it could be said with a reasonable degree of scientific certainty that plaintiff caused the bite marks on Mrs. Kennedy's breast.[12]

7. This opinion was reported to Walpole Police Officer James Dolan [a defendant herein] who, in turn, after the District Attorney had concluded that the plaintiff should be arrested, incorporated that opinion in a report submitted to a clerk-magistrate of the Wrentham District Court in connection with the filing of a criminal complaint and the issuance of an arrest warrant.[13]

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[11] Dr. Levine construed the term, "reasonable degree of scientific certainty", as a "high degree of probability."

[12] Dr. Levine testified that he usually qualifies his opinions by indicating that the phrase, "reasonable degree of scientific certainty', means a "high degree of probability". But he could not recall if he conveyed that language when he spoke to Trooper McDonald on the telephone. We accordingly assume, for purposes of this motion for summary judgment, that Dr. Levine did not convey that cautionary caveat.

[13] The report prepared in connection with the application for an arrest warrant (Docket # 67, Deposition Exhibit 32A through the top of 32B) consisted of some seventeen (17) pages of incident reports, and was replete with matters and evidence suggesting that there was probable cause to believe that the plaintiff murdered Irene Kennedy. In terms of forensics and other indicia of probable cause, the applying officer indicated that:

> On 12-01-98 Irene Kennedy was brutally murdered in Bird Park. A State Police K-9 unit conducted a track from the victim. The K-9 lead directly to Edmund Burke's front door at 315 Pleasant St.
>
> Edmund was interviewed and he said that he had been sleeping all morning. Our investigation revealed two independent witnesses who saw him outside of his house in his yard on the morning of the murder. They also described the clothing he was wearing. He has denied owning clothing of this type.
>
> Edmund has changed his story several times during the course of this investigation to try and explain his actions. They are all inconsistent.
>
> Preliminary autopsy reports indicated that Irene Kennedy had been bitten on her breasts. These bites appear to be human. They were examined by Forensic Dentist Kate Crowley of the Medical Examiners Office and compared to impressions of Edmund Burke's teeth.

(continued...)

In preparing that report for the clerk magistrate, Officer Dolan had no reason to believe that the opinion rendered by Dr. Levne was anything but accurate.[14] That opinion was also reported to State Police Officer Scott Jennings who, in turn, incorporated that opinion in an affidavit filed in connection with an application for a search warrant to search defendant's premises on December 10, 1998.

8. The clerk-magistrate of the Wrentham District Court, upon receipt of Officer Dolan's report, issued a warrant of arrest. The plaintiff's arrest was based on and pursuant to that arrest warrant.[15]

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[13] (...continued)

She requested that Dr. Lovell Levine examine them also. He is the leading expert in the country and has testified as such. He is a Forensic Dentist with over thirty years of experience. He determined that the marks were bite marks made by human teeth. He has also determined with reasonable scientific certainty that the they [sic] were made by Edmund Burke. (Emphasis added).

Based on the above facts, there is probable cause to believe that Edmund Burke entered Bird Park on the morning of 12-1-98 and brutally murdered Irene Kennedy. I am requesting a warrant for his arrest for murder.m

[14] That is to say, there is not a scintilla of evidence showing - indeed, not even a conclusory allegation - that Officer Dolan had any reason to question the expertise of the opinion rendered by Dr. Levine, someone who he [Dolan] considered to be the leading forensic expert in the field of dentistry in the country. *See* note 13, *supra*.

[15] When this court issued its report and recommendation (# 231) on motions to dismiss filed by defendants Crowley, Kessler, and Evans, on May 15, 2003, adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, (G.L. c. 12, § 11(H)), there was a question remaining as to whether a warrant of arrest had issued. See Report and Recommendation (# 231, p. 12 and n. 17). Since that time, based on additional matters submitted in connection with the various and sundry motions for summary judgment, this court finds and concludes that all of the relevant and material evidence points to but one conclusion as a matter of law - that the warrant had issued prior to plaintiff's arrest. That is to say, all the material evidence would not permit a reasonable trier of fact to conclude that plaintiff's arrest was not made pursuant to a warrant.

Officer Dolan testified at his deposition that he applied for an arrest warrant, and that that arrest warrant was issued by Clerk Magistrate Edward Doherty on December 10th. The arrest warrant and return thereon has been submitted as an exhibit (Exhibit U to the Statement of Undisputed Facts (# 219) filed by the Town of Walpole and its various police officers) and # 259, Exhibit U. The first docket entry - entitled to conclusive effect in the absence of a showing to the contrary, *Howard v. Local 74, Wood, Wire and Metal Lathers International*, 208 F.3d 930, 934 (continued...)

9. At or about 11:00 a.m., December 10, 1998,[16] and before Officer Dolan applied for the arrest warrant, an employee at the Maine State Laboratory reported to two Massachusetts State troopers that DNA analyses concluded that the saliva found at the scene of the crime was not that of the plaintiff. That information was not made known to Dr. Levine at any time prior to his rendering his opinion, or, indeed, prior to the arrest of the plaintiff.[17] Nor was

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[15] (...continued)
(7th Cir. 1953) - in plaintiff's underlying criminal case indicates that he was arrested on a warrant. (# 259, Exhibit U). State Police Officer Kevin Shea, in response to a question put to him at a deposition by counsel for the plainttiff, testified that the arresting officers had a warrant at the time they arrested the plaintiff (# 259, Exhibit D - Deposition of Kevin Shea, pp. 138-139). Plaintiff has proffered nothing of substance which even remotely suggests to the contrary. All he says is that Town of Walpole Police Chief testified to the contrary. The rather quixotic portion of the testimony he relies upon, however, hardly says that a warrant was not issued before the arrest. When asked when he [Chief Betro] formed an opinion as to the guilt of plaintiff, Chief Betro testified (Town of Walpole Statement of Undisputed Facts (# 219, Exhibit W, p. 89))

> Well, after the arrest was made I was informed as to, I was not privy at that time to any meetings which were, or any, that were going on in my station with the District Attorney and the state police and my detectives, as well. The decision was made to seek an arrest warrant. After the fact I was told to seek an arrest warrant. (Emphasis added)

Plaintiff excerpts the underscored above for the remarkable position that a warrant was not issued before the arrest of the plaintiff. What plaintiff omits, however, is that which immediately follows in that same answer, to wit:

> An Affidavit was put together by the state police and an arrest warrant, Detective Dolan went to court to obtain the warrant and they went down to make the arrest. At that point in time I was informed they were going down to arrest Ed Burke. (Emphasis added).

In context, plaintiff cannot, from this, realistically suggest that the warrant was issued after plaintiff's arrest. It is but a line taken out of context in connection with a question put concerning an entirely different matter and, purposefully or otherwise, left in an ambiguous state by the examiner - in this case, counsel for the plaintiff.

[16] There is a question as to this date. Other evidence suggests that Trooper McDonald became aware of the DNA reports on December 11, 1998, after plaintiff's arrest, and not on December 10, 1998. State Police officer Kevin Shea testified at his deposition that he was first notified of this fact by Trooper Steven McDonald on December 11 - the date of plaintiff's arraignment, and that he [Shea] immediately relayed that information to the prosecutor who, in turn, advised plaintiff's defense counsel and the arraignment judge. For purposes of the motion for summary judgment, however, this court assumes the December 10th date.

[17] In his opposition in this case (# 262, p. 5), plaintiff misrepresents the record in suggesting that Dr. Levine was aware of the DNA report before the arrest of the plaintiff. Plaintiff says (# 262, p. 5):

> At 11:00 a.m., on the morning of December 10, 1998, Theresa Callichio of the Maine State Police Lab informed Trooper McDonald that the DNA excluded Mr. Burke. McDonald claims that he told at least two people of this call, Assistant District Attorney John Kivlan, (a prosecutor)

(continued...)

that information made known to Officer Dolan before he applied for the arrest warrant, or to any arresting officer until after the arrest of the plaintiff.[18]

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[17] (...continued)
and Lowell Levine. Lowell Levine, in an astonishing display of arrogance, immediately assumed that the DNA must have been contaminated, and told that to McDonald. Deposition Transcript of Steven McDonald, p. 109, appended as Exhibit L to Defendant Mattaliano, Et Al's Statement of Undisputed Facts. (Emphasis added).

Putting to one side plaintiff's unsupported oratory ("an astonishing display of arrogance"), which is not apparent from the record, and putting to one side plaintiff's erroneous reference (there is no p. 109 to the Deposition transcript appended as Exhibit L - this court, however, searched other submissions and found page 109 in the Deposition of Steven McDonald at Exhibit I of plaintiff's own earlier opposition (# 228) to the motion to dismiss or for summary judgment filed by defendant Levine), the suggestion that Levine was aware of the DNA report before the arrest of the plaintiff is erroneous, at best, deceiving, at worst. In fact, as it shows without equivocation on page 108 of that same deposition, that conversation was held on December 11, after plaintiff's arrest, at or about the time of arraignment, to wit:

Q. Okay. Now let's get back to Lowell Levine, you have this conference with Levine on the day of arraignment?
A. Correct.

Counsel for plaintiff, who asked the very question, and who received the very answer, surely must have known better to suggest, in a misleading way, that Levine (or anyone else except, perhaps, Trooper Steven McDonald) knew anything about the DNA reports before the arrest of the plaintiff.

Elsewhere, in a similar vain, counsel for plaintiff allows in his opposition to the motion for summary judgment filed by the Massachusetts State Police officers (# 262, p. 5):

> Later that afternoon, McDonald told Levine that the police still desired to arrest Mr. Burke and the decision hinged on Levine's willingness to stand by his previously drawn conclusions. Id. at 130.

The reference to page 130 of the McDonald deposition transcript, however, says no such thing. This court's reading of the entirety of the McDonald affidavit reveals nothing of the sort. It is, again, something that plaintiff has woven from whole cloth without any regard to the true state of the record before this court. While plaintiff may wish to roll his dice before a jury, a consistent theme throughout his oppositions, see note 22, *infra*, he may not take liberty with the record and misrepresent that record to bring his case before a jury.

[18] At the hearing before this court, which included motions for summary judgment filed by all the parties (excepting Crowley, Kessler, Evans, or the Commonwealth of Massachusetts), counsel for plaintiff, while unable to point to any factual support, argued, for the first time, insofar as this court can determine, that it could be reasonably inferred that since Trooper Steven McDonald and Trooper Robert Martin received the information concerning the DNA testing on December 10, 1998, one or the other imparted that same information to Officer Dolan prior to the time that he applied for the arrest warrant, and prior to the time that plaintiff was arrested. Until the hearing on the motions, plaintiff had not even alleged that Officer Dolan was made aware of the DNA report.

That, however, is pure speculation and conjecture - a suggestion woven from whole cloth, and nothing else. Indeed, the only evidence which plaintiff has discovered on this matter is that, whatever the date Trooper McDonald may have thought that he received that information, he did not impart that information to anyone until December 11, 1998, the day after plaintiff's arrest, and, then, only to Massachusetts State Trooper Kevin Shea and Assistant District Attorney John Kivlan - not to Officer Dolan at any time. Nothing could be clearer from the testimony of Trooper Steven McDonald, upon which plaintiff relies as suggesting that Trooper McDonald was aware of the DNA tests on December 10, to wit (Exhibit I to Plaintiff's Local Rule Statement (# 228 - Deposition of Steven
(continued...)

10. As of the present time, Dr. Levine remains of the opinion to a reasonable degree of scientific certainty[19] that the bite mark on the breast of Ms. Kennedy matched the dentition of the plaintiff. And plaintiff has proffered no

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[18] (...continued)
McDonald, pp. 108-109):

A. I spoke with the Maine state police directly, the lab.
Q. And they told you they excluded him [Burke]?
A. Excluded. The profile does not match.
Q. And it's your testimony you communicated that immediately to John Kivlan?
A. Yes.
Q. Do you know as you sit here one way or the other whether that was communicated to the Judge at the arraignment.
A. I don't know. I talked to – Sergeant Shea was at the arraignment with [Assistant District Attorney] Jerry Pudolsky who was the ADA handling the case and I also spoke with Kevin and let him know what was going on.
Q. Did you speak to Pudolsky directly?
A. No, I did not. John Kivlan and Jerry Shea were the two I spoke to.

And that arraignment attended by ADA Pudolsky and Trooper Shea, of course, was held on December 11, the day after plaintiff's arrest. Town of Walpole's Local Rule 56.1 Statement (# 219 - Exhibit N (Deposition of Kevin Shea, pp. 143-144)); Town of Walpole's Local Rule 56.1 Statement (# 219 - Exhibit V (Deposition of Gerald Pudolsky, pp. 37-43)). State Police Officer Shea also testified that he first learned of the DNA results on December 11 - the day of the arraignment, and not on the day of arrest (# 259, Exhibit D - (Deposition of Kevin Shea, p. 143)).

Indeed, at a continued deposition of Trooper Steven McDonald noticed by counsel for plaintiff, Trooper McDonalld testified unequivocally that he first learned of the negative DNA analyses on December 11, 1998, the day of plaintiff's arraignment, and the day after his arrest. Plaintiff's Statement of Undisputed Facts (# 250, (Exhibit O - Deposition of Steven McDonald, p. 54)).

[19] As Dr. Levine (then and now) understood that phrase, to wit: a "high degree of probability."

meaningful evidence to the contrary,[20] putting to one side the mere *ipse dixit* of counsel for plaintiff.[21]

II. The Summary Judgment Standard

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[20] Consistent with discovery and other scheduling deadlines, first imposed by the district judge to whom this case is assigned, and later by this court on motions for extensions of time, the plaintiff did not designate any expert on the matter of forensic dentistry or bite mark comparisons.

In terms of actual evidence, plaintiff only proffered his own lay opinion, to wit: "It is scientifically impossible for my dentition to match bite marks found on Irene Kennedy's body." (Affidavit of Edmund F. Burke, # 227, ¶ 6), and evidence of the fact that DNA analyses excluded plaintiff as the owner of the saliva found on Mrs. Kennedy's body. The Burke Affidavit says nothing, since there is nothing whatsoever showing that he is qualified to give any sort of scientific opinion. So, too, with the DNA evidence. That augured against a match of saliva, but it did not, and still has not, shown that Dr. Levine's opinion was or is inaccurate to a reasonable degree of scientific certainty.

Plaintiff has one more arrow in his sheath in an attempt to suggest to the contrary. Contrary to prior orders of this court relating to the designation of experts, plaintiff attempted to do indirectly that which he could not do directly. He submitted his Supplemental Opposition to Lowell Levine's Motion for Summary Judgment (# 226), something which plaintiff describes as a timely filed "Rule 26 Report and Affidavit of Richard Souviron, D.D.S. We do not know what plaintiff means by saying that this filing was timely. It was not.

On February 27, 2003, given the fact that plaintiff has had more than three years in which to prepare his case, this court, by Order (# 208) of that same date, denied plaintiff's motion for an extension of time to designate experts (# 205). Plaintiff did not seek any review of that Order (# 208) by the district judge to whom this case is assigned consistent with the provisions of Rule 72(a), F.R. Civ. P. or Rule 2(a) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts. Instead, some two months later, he filed a motion for reconsideration (# 213) of that earlier order. On April 10, 2003, this court denied that motion for reconsideration. Again, plaintiff did not seek any review of that Order (# 208) by the district judge to whom this case is assigned consistent with the provisions of Rule 72(a), F.R. Civ. P. or Rule 2(a) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, and any attempt to do so now would be clearly untimely and improper. *See e.g.*, Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Park Motor Martd, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *see also*, *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466 (1985).

And, in any event, Dr. Souviron says nothing which casts any doubt whatsoever on the opinion of Dr. Levine. At best, Dr. Souviron avers that he [Souviron] is unable to form an opinion on the basis of that given to him by counsel for the plaintiff. That says nothing.

[21] Notwithstanding the fact that co-counsel for plaintiff previously used the expert services of Dr. Levine for his [then] client's benefit, lead counsel for the plaintiff off-handedly, and without citation to any meaningful authority, simply argued that bite mark evidence is but "junk science." That view, however, is not shared by any others who should know, so far as this court can determine. To the contrary, some thirty jurisdictions (and there may be more, but simply not reported), including the Commonwealth of Massachusetts, have concluded that, far from being the "junk science" that counsel now suggests, bite mark evidence is relevant, reliable, and admissible. *See e.g.*, *Commonwealth v. Cifizzari, 397 Mass. 560, 492 N.E.2d 357 (1986); State v. Blamer,* 2001 WL 109130 at *4 (Ohio App. 5 Dist., 2001); *Seivewright v. State,* 7 P.3d 24, 29-30 (Wyo.2000); *Brooks v. State,* 748 So.2d 736, 739 (Miss.1999); *People v. Marsh,* 177 Mich.App. 161, 441 N.W.2d 33, 36 (1989); *State v. Armstrong,* 179 W.Va. 435, 369 S.E.2d 870, 877 (1988); *State v. Stinson,* 134 Wis.2d 224, 397 N.W.2d 136, 140 (Ct . App.1986); *Spence v. State,* 795 S.W.2d 743, 750-52 (Tex.Crim.App.1990); *Sievewright v. State of Wyoming*, 7 P.3d 24 (2000); see also, *Brooks v. State of Mississippi*, 748 So.2d 736, 746-47 (1999)(referring to some twenty or more jurisdictions in which bite mark evidence is admissible).

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed `to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)(quoting Fed.R. Civ. P. 1).

To survive a motion for summary judgment, the opposing party must demonstrate that there is a genuine issue of material fact requiring a trial. Fed. R. Civ. P., 56(e); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As the Supreme Court recently has made clear, the standard for granting summary judgment "mirrors" the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). That is, the inquiry focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no `genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

A plaintiff may not obtain a trial merely on the allegations in its complaint, *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 289-290 (1968), or by showing that there is "some metaphysical doubt as to the material facts," Matsushita, supra, 475 U.S. at 586 (citations omitted). Where the non-moving party will bear the burden of proof at trial, Rule 56(c) mandates the entry of summary judgment against that party where it "fails to make a showing sufficient to establish the existence of an element essential to that party's case...." *Celotex Corp. v. Catrett*, 477 U.S. at 322. That is to say,

to avoid summary judgment, the opposing party "...must produce at least some evidence reasonably affording an inference supporting the existence of a triable issue of fact [with respect to the element which the opposing party must establish at trial]." *Santiago, et al. v. Group Brasil, Inc.*, 830 F.2d 413, 416 (1st Cir. 1987).[22]

III. The Substantive Civil Rights Claims Sections 1983 and G.L. c. 12, § 11 I (Counts 1, 2, 3, 4 and 7)

In Counts 1, 2, 3, 4,[23] and 7, plaintiff alleges that all of the state police defendants violated 42 U.S.C. § 1983 and G.L. c. 12, § 11I, respectively, in that they caused plaintiff to be arrested and detained in the absence of probable cause, and in that they caused plaintiff's premises to be searched without probable cause, all in violation of the Fourth Amendment and the Massachusetts Declaration of Rights.[24]

Defendants herein move for summary judgment on the grounds that, on the basis of the undisputed material facts, plaintiff cannot make out a claim of an illegal arrest, an

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[22] As a consistent theme throughout this case, counsel for plaintiff simply allows that issues such as knowledge, intent, whether or not the parties engaged in a conspiracy, and the like, are but fodder for the jury. But that, of course, is totally inconsistent with *Santiago* and a host of First Circuit cases addressing the summary judgment standard. Only if plaintiff shows, at the summary judgment stage, that there is a triable issue of fact as to a material fact forming an element of an offense, that is, something more than mere conjecture, does the matter reach the jury, regardless of whether that element is one of knowledge, intent, or the like. *See e.g.*, *Local No. 48, United Broth. of Carpenters and Joiners of America v. United Broth. of Carpenters and Joiners of America*, 920 F.2d 1047, 1051 (1st Cir. 1990)("Even in cases involving so ineffable a matter as motive or intent, summary judgment may be warranted "if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Medina-Munoz*, 896 F.2d at 8; *see also Rossy v. Roche Products, Inc.*, 880 F.2d 621, 624 (1st Cir.1989); *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 109-10 (1st Cir.1988).")

[23] Counts 1 through 4 are brought under 42 U.S.C. § 1983.

[24] Count 1 names Dolan, Bausch, and Kenney as defendants; Count 2 names Betro as a defendant; Count 3 names Stillman as a defendant; Count 4 names the Town of Walpole as a defendant; and Count 7, brought under the Massachusetts Civil Rights Act, names all Walpole police officers and the Town of Walpole as defendants.

illegal detention, or an illegal search. The individual defendants herein also contend that they are immune from liability under the civil rights statutes.[25]

A. Defendant Dolan

Insofar as this court can determine from that which has been proffered by the plaintiff, he apparently contends that Dolan is liable to him under Section 1983 because (1) he applied for an arrest warrant without probable cause; or (2) he applied for that arrest warrant notwithstanding the fact that he [Dolan] knew that the plaintiff had been "cleared" by a negative DNA analysis; or (3) he [Dolan] was the one who took plaintiff into custody after having applied for the warrant of arrest.[26]

The Arrest Warrant Application

The Existence of Probable Cause in the Warrant Application

Insofar as plaintiff contends that Dolan is liable to him for applying for an arrest warrant without probable cause, this court finds and concludes that that presented to the issuing magistrate, as a matter of law,[27] stated probable cause to believe that plaintiff

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[25] Before addressing the matter of immunity, qualified or otherwise, this court must first determine whether any conduct on the part of Levine caused plaintiff to suffer a constitutional injury. *See e.g.*, *Abreu-Guzman v. Ford*, 241 F3d 69, (1st Cir. 2001). This court addresses those issues separately insofar as plaintiff brings civil rights claims against the remaining State Police defendants.

[26] Insofar as Count 1 is directed to defendant Dolan and Bausch and Kenney (the latter two discussed in the text below), the thrust of plaintiff's complaint against those officers is that those officers allegedly violated his Fourth and Fifth Amendment rights. In particular, plaintiff alleges in Count 1 (¶ 63):

> Specifically. the defendants deprived Mr. Burke of rights secured and guaranteed to him by the United Stakes Constitution including but not limited to, his Fourth Amendment right to freedom from unlawful seizure of his person and his Fifth and Fourteenth Amendment rights to due process of law.

[27] Plaintiff, in an obvious attempt to get his case before a jury, has insisted throughout that the existence *vel non* of probable cause is a question for the jury. On this, however, plaintiff is only half right. It is for the trier of fact to ascertain the underlying facts. But it is the duty of the court to determine whether those facts so found constitute probable cause within the meaning of Fourth Amendment jurisprudence. *E.g.*, *Martin v. Applied Cellular Technology, Inc.*, 284 F.3d 1, 7 (1st Cir. 2002). In this respect, whether those facts brought to the attention (continued...)

murdered Irene Kennedy. Among other things presented to the issuing magistrate was the following: (1) that a State Police K-9 unit tracked directly from the murder scene to plaintiff's house; (2) that plaintiff lied to the investigating officers in at least two respects (*i.e.*, that he was sleeping at the time of the murder, whereas two witnesses saw him outside his house in the yard at the time of the murder, and that he did not possess clothing described by those two witnesses who saw him in his yard), and consistently "changed his story"; and (3) that "...Dr. Lowell Levine...the leading expert in the country and [who] has testified as such [and who]...is a Forensic Dentist with over thirty years of experience...determined that the marks [on Mrs. Kennedy's breast] were bite marks made by human teeth [and that Dr. Levine]...has also determined with reasonable scientific certainty that the they [sic] were made by Edmund Burke." In this Circuit, "probable cause" has been defined, consistent with established precedent, as follows (*United States v. Fiasconaro*, 315 F.3d 28, 34-35 (1st Cir. 2003)):

> Probable cause exists when " 'the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.' " *United States v. Figueroa*, 818 F.2d 1020, 1023 (1st Cir.1987) (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964)). In other words, we consider the totality of the circumstances in evaluating whether the government demonstrated a sufficient " '[p]robability ... of criminal activity,' " Id. at 1023-24 (quoting *Illinois v. Gates*, 462 U.S. 213, 235, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). "Probability is the touchstone.... [T]he government need not show 'the quantum of proof necessary to convict.' " Id. at 1023 (quoting *United States v. Miller*, 589 F.2d 1117, 1128 (1st Cir.1978)).

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[27] (...continued)
of the issuing magistrate amounted to probable cause to believe that the plaintiff murdered Irene Kennedy is a pure question of law for the court, and not the jury.

Given the facts set forth above - *i.e.*, the fact that a K-9 tracked a scent directly from the murder scene to plaintiff's house, plaintiff's lies concerning his whereabouts at the time of the murder, and the conclusion by Dr. Levine to a scientific certainty that the bite marks found on Mrs. Kennedy's breast matched the dentition of the plaintiff[28] - it is clear that, as a matter of law,[29] a reasonably prudent person would and could believe that plaintiff murdered Irene Kennedy.

Qualified Immunity

Moreover, even if a court, in studied retrospect and further reflection, should conclude that that stated to the issuing magistrate fell short of probable cause within the meaning of the Fourth Amendment, qualified immunity clearly protects defendant Dolan in the circumstances of this case. Under settled principles in this Circuit and elsewhere (*Iacobucci v. Bolter*, 193 F.3d 14, 21-22 (1st Cir. 1999)):

> Qualified immunity is a medium through which "the law strives to balance its desire to compensate those whose rights are infringed by state actors with an equally compelling desire to shield public servants from undue interference with the performance of their duties and from threats of liability which, though unfounded, may nevertheless be unbearably disruptive." *Buenrostro v. Collazo*, 973 F.2d 39, 42 (1st Cir.1992) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

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[28] Plaintiff suggests, syllogistically, that the opinion of Dr. Levine was flawed; hence, there was no probable cause; and, therefor, Dolan is liable under Section 1983.

In this court's view, however, and counsel for plaintiff's musings about "junk science" to one side, "bite mark" evidence is reliable evidence upon which a finding of probable cause can be made, for the reasons set forth in note 21, *supra*. And, in any event, that is quite beside the point, since plaintiff has proffered nothing to suggest that Officer Dolan had any reason to question an opinion reached to a scientific certainty by the leading forensic dentist in the country. It is one thing to ask our law enforcement officers to be current to evolving constitutional standards relating to the interplay between the police and those that they encounter. It is quite another to ask those law enforcement officers be current on the evolving minutia of the forensic sciences.

[29] See note 27, *supra*.

"Hence, state officials exercising discretionary authority are entitled to qualified immunity insofar as their conduct does not transgress clearly established constitutional or federal statutory rights of which a reasonably prudent official should have been aware." *Id.* To ascertain a defendant's eligibility for such immunity, a court must inquire into the objective legal reasonableness of the defendant's actions, gauged in connection with the mosaic of legal rules that were clearly established when the defendant acted. *See Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In operation, the outcome of this inquiry "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.*

Iacobucci asserts that Boulter, a policeman acting under color of his official authority, lacked probable cause to arrest him and thereby violated his Fourth Amendment rights. In this wise, he observes that a citizen's right to be free from arrest in the absence of probable cause has long been clearly established. *See*, *e.g.*, *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). That observation sweeps so broadly, however, that it bears very little relationship to the objective legal reasonableness *vel non* of Boulter's harm-inducing conduct. *See Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1699-1700, 143 L.Ed.2d 818 (1999). The "right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034. Our inquiry, then, reduces to whether a reasonable police officer, standing in Boulter's shoes, would have known that arresting Iacobucci for disorderly conduct, under all the attendant circumstances, would contravene clearly established law. That inquiry must proceed in light of the commonly held understanding that probable cause exists only if the facts and circumstances within the arresting officer's knowledge "are sufficient to lead an ordinarily prudent officer to conclude that an offense has been, is being, or is about to be committed, and that the putative arrestee is involved in the crime's commission." *Logue v. Dore*, 103 F.3d 1040, 1044 (1st Cir.1997).

That is to say, in a phrase, and more in the context of that which is presented here, qualified immunity is meant to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335 (1986).

The Alleged Failure to Disclose the Results of the DNA Analysis

Plaintiff next apparently contends that the failure of Officer Dolan to disclose to the magistrate who issued the arrest warrant the fact that the Maine State Police Laboratory had concluded that the DNA found at the scene of the crime did not match that of the defendant violated his civil rights. Putting to one side the inconsistency of this position,[30] the long and short of this contention is that plaintiff has not shown, and, indeed, cannot show, that Officer Dolan was aware of the DNA analysis. All that plaintiff has shown, and can show, is that Troopers McDonald and Martin, at some time on December 10, 1998,[31] received some information from the Maine State Police Laboratory which concluded that the DNA found at the murder scene did not match the DNA of the plaintiff. But there is not a scintilla of evidence, indeed, not even an exciting suspicion, that either Trooper Martin or Trooper McDonald transmitted this information to Officer Dolan. Quite to the contrary, Trooper McDonald testified, without contradiction in any respect, that the only persons informed of these results were Trooper Shea and the Assistant District Attorney, and that that information was imparted to them on December 11, 1998, the day after plaintiff's arrest.

The Alleged Warrantless Arrest of the Plaintiff

The Existence of Probable Cause for the Warrantless Arrest and Qualified Immunity

Insofar as plaintiff contends that Dolan is liable to him for arresting him without a warrant, a position which is contrary to the undisputed facts as set forth above, plaintiff has

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[30] On the one hand, plaintiff says that he was arrested withiout an arrest warrant; on the other, he says that that the arrest warrant which issued was based on misleading information because Officer Dolan did not disclose to the issuing magistrate the results of the DNA analysis.

[31] Viewing the record most favorably to the plaintiff. See note 16, *supra*.

not, and cannot, make out a case that the plaintiff was arrested without probable cause. Even if Officer Dolan did not apply for a warrant, and even if a warrant did not issue, it is undisputed that all of that information set forth in the application for that complaint and warrant was known to Officer Dolan at the time of plaintiff's arrest. And, for the reasons set forth above *vis a vis* the contention that Office Dolan did not have probable cause in support of an application for a criminal complaint and warrant, pp. 13-15, *supra*, there was clearly probable cause to arrest the plaintiff for the murder of Irene Kennedy.

And, again, even if a court, in studied retrospect and further reflection, should conclude that known to Officer Dolan at the time of the arrest fell short of probable cause within the meaning of the Fourth Amendment, qualified immunity clearly protects defendant Dolan in the circumstances of this case for the reasons set forth above, pp. 15-17.

B. Defendants Bausch and Kenney

The complaint, general in nature in that, in many respects, it simply says that all defendants did this or that, does not particularize any action (or inaction) on the part of Officer Bausch or Officer Kenney, which would, on its face, constitute a violation of plaintiff's civil rights. In his written opposition to defendants' motion for summary judgment, plaintiff adds nothing on this score. At the hearing on the defendants' motion for summary judgment, this court asked counsel for plaintiff to particularize those facts which suggest that defendant Bausch or Kenney violated plaintiff's civil rights. Apart from the oft-

repeated response of a conspiracy,[32] he could not point to any such facts.[33] Neither Bausch nor Kenney applied for the arrest warrant. Neither participated in the arrest of the plaintiff. Nor did they apply for the later search warrant of plaintiff's house, or participate in the later search of plaintiff's house pursuant to that warrant. In these circumstances, plaintiff has not made, and cannot make, out a claim that defendant Bausch or defendant Kenney, as a substantive matter, violated the civil rights of the plaintiff within the meaning of Section 1983 or the Massachusetts Civil Rights Statute.

C. Defendants Betro and Stillman

In Count 2, plaintiff alleges that at all relevant times, defendant Stillman was a superior officer - *i.e.*, a lieutenant on the Walpole Police Force. So too in Count 3 wherein plaintiff alleges that, at all relevant times, defendant Betro was the Chief of the Walpole Police Department. In each of the counts, plaintiff alleges that these defendants are liable to him under Section 1983 and the Massachusetts Civil Rights Statute on account of the unconstitutional actions visited upon him by Officers Dolan, Bausch and Kenney.[34] It is not alleged (much less shown in any respect) that either Stillman or Betro applied for the

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[32] Discussed *infra*.

[33] All counsel for plaintiff could say on this score is that Officer Bausch and Officer Kenney were two of many law enforcement officers detailed to the investigation of the murder of Irene Kennedy.

[34] For example, in Paragraph 70 of the Complaint, plaintiff alleges:

> When Officers Bausch, Kenney, and Dolan, violated the constitutional rights of Mr. Burke, as described above, they were under the authority and command of defendant Stillman. Stillman was a lieutenant in the town of Walpole Police Department..

Similarly, in Paragraph 75 of the Complaint, plaintiff alleges *vis a vis* Chief Betro:

> When Officers Bausch, Kenney, Dolan, and Stillman violated the constitutional rights of Mr. Burke, as described above, they were under the authority and command of defendant Betro.

arrest warrant, participated in the arrest of the plaintiff, or participated in the search of plaintiff's residence after his arrest. Wholly apart from the fact that plaintiff has not marshaled a single fact suggesting that the policies maintained and practiced by Betro and Stillman were grossly negligent or purposefully designed to violate the civil rights of others, much less that such policies caused the alleged constitutional harm suffered by the plaintiff,[35] the long and short of the claims against Betro and Stillman, stripped of all boilerplate verbiage, is that Betro and Stillman, because of improper training and/or policies and the like, caused defendants Dolan, Bausch, and Kenney to violate the plaintiff's constitutional rights as further alleged under Count 1 against Dolan, Bausch and Kenney. But that singular allegation falls with its premise. That is to say, inasmuch as this court concludes, pp. 13-19, that none of the actions (or inactions) of Officers Dolan, Bausch, or Kenney, violated the civil rights of the plaintiff, plaintiff has not shown, and,

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[35] For example, in Count 3 of his Complaint against Betro, plaintiff alleges (¶ 76), among other things, that the failure of Betro to discipline his police officers imposes Section 1983 liability.

If plaintiff means by this that Betro is liable to him under Section 1983 (and the Massachusetts Civil Rights statute) for his failure to discipline Officers Dolan, Bausch and Kenney after plaintiff had been (allegedly) unlawfully arrested, plaintiff surely misses the mark.

To impose liability on one's supervisors, a plaintiff must be able to establish that the defendant's actions created "an 'affirmative link' between the conduct of the supervisor and that of the employee." *Voutour v. Vitale*, 761 F.2d 812, 820 (1st Cir. 1985); *see also*, *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n. 8 (1985). That is to say, a plaintiff must show that the action or inaction of a supervisor, in some manner, "caused" the injury of which a plaintiff complains. Plaintiff cannot make that showing here. Plaintiff has not cited any authority whatsoever suggesting that a single failure to discipline subordinates after an allegedly illegal arrest imposes Secton 1983 liability on a supervisor. For the reasons set forth by this court in its report and recommendation *vis a vis* the motions to dismiss filed by defendants Crowley and Evans (# 231)(adopted, approved [with a modification adding an additional ground for allowance of the motions to dismiss]), and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)), a failure to discipline, without more, does not warrant Section 1983 relief.

As another time warp example, plaintiff alleges (¶ 77) that Chief Betro "failed to remain current with the State of the Art of forensic policing." But that allegation, no doubt inserted as a precursor to a later inserted state law claim of defamation against Chief Betro (Count 10), has nothing to do with the arrest (or, indeed, continued detention) of the plaintiff. To the contrary, that is a reference to a statement allegedly made by Chief Betro well after the plaintiff had been arrested; indeed, plaintiff says, in support of a defamation claim, that that statement was made after his release by the authorities.

indeed, cannot show, that the actions (or inactions) of their [Dolan's, Bausch's, and Kenney's] supervisors caused any constitutional harm to the plaintiff.

D. Town of Walpole

The substantive civil rights claims against the Town of Walpole (Count 4) mirror the claims against defendants Stillman and Betro as supervisors. That is to say, plaintiff alleges that the policies of Betro and Stillman are, indeed, the policies of the Town of Walpole. And that those policies caused the illegal arrest and detention of the plaintiff.

Under settled precedent, of course, Section 1983 does not impose vicarious liability on municipalities. *Monell v. New York City Dep't. of Social Servs.*, 436 U.S. 658 (1978). And for the reasons set forth immediately above with respect to defendants Betro and Stillman, plaintiff has not shown, and, indeed, cannot show, that any of the policies of the Town of Walpole contributed, in any respect, to the unconstitutional arrest and detention of the plaintiff, since, as indicated above, pp. 13-19, none of the actions (or inactions) of the individual police officers (Dolan, Bausch and Kenney) caused any constitutional harm to the plaintiff.

For all of these reasons, the Town of Walpole and its police officers (Betro, Stillman, Dolan, Bausch, and Kenney) are entitled to summary judgment *vis a vis* the substantive civil rights claims brought under Section 1983 and the Massachusetts Civil Rights Act (Counts 1 though 5 and 7).

IV. The Civil Rights Conspiracy Claims (Count 6)

In Count 6, plaintiff alleges that all of the defendants in this action and the related actions, including the Town of Walpole and its police officers (Betro, Stillman, Dolan, Bausch, and Kenney) conspired to violate the civil rights of the plaintiff.[36]

In this court's report and recommendation (# 231)[37] as to the motions to dismiss filed by defendants Crowley, Evans and Kesslar, this court concluded, in part (*Id.* at pp. 17-18):

> Notwithstanding that said immediately above *vis a vis* plaintiff's substantive claims against Crowley under Section 1983 (Count 2) and the Massachusetts Civil Rights Act (G.L. c. 12, § 11 I)(Count 4), plaintiff has not fairly pleaded a conspiracy to violate plaintiff's civil rights under Section 1983 as alleged in Count 3 and the remainder of the allegations of the Third Amended Complaint.
>
> It goes without saying that, in order to establish a conspiracy, plaintiff must allege sufficient facts that the defendant Crowley agreed with others, tacitly or otherwise, to violate plaintiff's civil rights. Vague and conclusory allegations of the existence of a conspiracy are not enough to sustain a plaintiff's burden - a complaint must contain factual allegations suggesting that the defendants reached a meeting of the minds. *See e.g.*, *Amundsen v. Chicago Park Dist.*, 218 F.3d 712, 718 (7th Cir.2000); *Francis-Sobel v. Univ. of Maine*, 597 F.2d 15, 17 (1st Cir.1979); *Slotnick* v. *Garfinkle*, 632 F.2d 163, 166 (1st Cir.1980) (affirming dismissal because complaint "neither elaborates nor substantiates its bald claims that certain defendants 'conspired' with one another"). That is to say, merely asserting the existence of a conspiracy by pleading the conclusory word, "conspiracy', does not make the day. *E.g.*, *Hanania v. Loren-Maltese*, 212 F.3d 353, 356 (7th Cir.2000).
>
> In this case, that is all that plaintiff has alleged. In Count 3, plaintiff simply alleged:
>
> > 81. By having engaged in the conduct described above, the Defendants conspired to deprive Mr. Burke of the equal

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[36] Count 6 only references Section 1983, and not the Massachusetts Civil Rights Act. It is not clear whether plaintiff is alleging a conspiracy under Count 7, the only count which references the Massachusetts Civil Rights Act. For purposes of this report and recommendation, however, this court assumes that plaintiff charges all of the defendants with a conspiracy to violate the civil rights of the plaintiff in violation of the Massachusetts Civil Rights Act - whether it be delimited in Count 6 or Count 7. It makes no difference for the reasons which follow.

[37] With a modification not relevant here, that report and recommendation was approved and adopted as an order of the court by the district judge to whom this case is assigned on August 5, 2003 (# 267).

> protection of the law or of the equal privileges and immunities under the law, and they acted in furtherance of the conspiracy, which resulted in the injury to Mr. Burke described above, in violation of 42 U.S.C. § 1983. (Emphasis added).
>
> That conclusory allegation, however, stands alone. There is not a single, solitary allegation of a fact in the 26 pages, more or less, of the Third Amended Complaint which even touches upon any meeting of the minds, tacitly or otherwise, between defendant Crowley and any other person...Plaintiff's use of the magic talisman, "conspired", in Count 3, against a backdrop of an allegation that it was the "Defendants" (without any specificity as to which defendants, if any) who so conspired, fails to meet the requirements of established law in this Circuit, *Francis-Sobel*, *supra*, and *Slotnick*, *supra*, that a bare minimum of facts must be pleaded in support of a conspiracy claim. (Footnotes omitted).

What was said there with respect to defendant Crowley, in the context of a motion to dismiss, applies with greater force within the context of defendants' motion fo summary judgment. Close to five years after the events in issue, and after some three years of discovery, all that plaintiff can muster on his conspiracy claim is that all of the defendants, in one respect or another, were detailed to the investigation of the murder of Irene Kennedy, or participated in that investigation, with an eye towards bringing the murderer, whomever he or she be, to book. There is not a single, solitary, fact suggesting that any of the defendants agreed,[38] tacitly or otherwise, to violate the constitutional rights of the plaintiff.[39] The Town of Walpole and the individual Walpole Police Officers (Betro, Stillman,

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[38] Plaintiff suggests in his opposition (# 249, p. 16) to defendant's motion for summary judgment that the "...defendants jointly and severally agreed to arrest the plaintiff." Putting to one side, however, the fact that, once again, plaintiff speaks in pure generalities in terms of which defendant, that is quite beside the point. For an agreement to arrest the plaintiff, standing alone, does not make out a civil rights conspiracy. To the contrary, plaintiff must make some sort of bare showing that the defendants (in this case, the Town of Walpole defendants) agreed to arrest plaintiff in the absence of probable cause, knowing, or having reason to know, that there was a lacking of probable cause. On this, plaintiff has produced absolutely nothing.

[39] An observation made by this court in the context of a report and recommendation on the motion for summary judgment brought by all of the investigating State Police officers deserves repeating here:

(continued...)

Dolan, Bausch, and Kenney) are entitled to summary judgment on Count 6 (and/or Count 7 to the extent that plaintiff alleges a conspiracy under the Massachusetts Civil Rights Act, see note 36, *supra*).

V. The Pendent False Imprisonment State Law Claim (Count 8)

In Count 8, plaintiff alleges that all of the defendants,[40] including the individual Town of Walpole police officers (Betro, Stillman, Dolan, Bausch, and Kenney) are liable to him for false imprisonment.

Under settled precedent, the tort of false imprisonment consists in the "(1) intentional and (2) unjustified (3) confinement of a person, (4) directly or indirectly (5) of which the person confined is conscious or is harmed by such confinement." *Noel v. Town of Plymouth*, 895 F.Supp. 346, 354 (D.Mass., 1995); See Restatement (Second), Torts § 35 (1965); *see also Wax v. McGrath*, 255 Mass. 340, 342, 151 N.E. 317, 318 (1926) (unlawful restraint by force or threat constitutes false imprisonment). A peace officer, however, is privileged to arrest a person on the basis of a warrant fair on its face. Restatement

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[39] (...continued)

Plaintiff says that conspiracies are stuff of the night, always covert, always secretive. No doubt that is, for the most part, true. But the fact that all of the officers were focused on bringing the murderer to justice does not add up to a conspiracy. After all, although he says that all of the investigating officers formed their secret cabal, after five years of investigation, plaintiff conceded that he had no evidence *vis a vis* defendants Mattliano and Buckley. Indeed, the notion of conspiracy blinks reality. Plaintiff concedes (and if he does not, he must) that Trooper McDonald (one of the alleged conspirators by allegedly failing to disclose the negative DNA report in a timely fashion) reported the DNA report to Trooper Shea before plaintiff's arraignment on the very next day. And it also cannot be gainsaid that Trooper Shea, upon receipt of that information, disrupted the start of the arraignment by beseeching the prosecutor's attention so that he could bring that information to the attention of the prosecutor. That is hardly the stuff of covert conspirators.

[40] It is not clear whether plaintiff, in using the caption "All defendants", in this pendent state law claim, as well as other pendent state law claims, means to include the Town of Walpole. To the extent that he does, however, the Town of Walpole is immune from suit for this intentional tort under the immunities of the Massachusetts Tort Claims Act (G.L. 258, § 10(c)).

(Second) of Torts § 122 (1965). And a peace officer is privileged to make an arrest without a warrant if the peace officer has probable cause to believe that the person arrested has committed a felony.

To the extent that Count 8 is directed to the defendant Dolan, the premise underlying the false imprisonment claim is, apparently, that Officer Dolan, in an application for a criminal complaint and arrest warrant, supplied the issuing officer less than probable cause, or that Officer Dolan, in applying for that arrest warrant, improperly failed to disclose exculpatory evidence (*i.e.*, that DNA found at the scene of the crime did not match the DNA of the plaintiff), or that Officer Dolan, in arresting plaintiff without a warrant, arrested him on less than probable cause to believe that he had committed a felony.

These are the very same claims made against Officer Dolan, cast in constitutional terms, under Count 1. For the very same reasons that Officer Dolan is entitled to summary judgment on Count 1, see pp. 25-31, *supra*, Officer Dolan is entitled to summary judgment on the pendent state law false imprisonment count (Count 8).

To the extent that the false imprisonment claim is brought against the remaining Town of Walpole police officers, none of whom participated in the application for an arrest warrant for the arrest of the plaintiff, for the reasons set forth above with respect to these defendants in connection with the constitutional claims brought against them, pp. 31-35, the remaining Town of Walpole defendants (Betro, Stillman, Bausch and Kenney) are entitled to summary judgment on Count 8.

VI. The Pendent Malicious Prosecution State Law Claim (Count 9)

In Count 8, plaintiff alleges that defendant Dolan (and perhaps other Town of Walpole Police officers named as defendants herein[41]) maliciously caused his prosecution.

To the extent that the claim is brought against Officer Dolan, plaintiff has not made out a claim, and cannot make out a claim, of malicious prosecution. Under settled Massachusetts law, to make out a claim for malicious prosecution, a plaintiff must show:

> "(1) the institution of criminal process against the plaintiff with malice; and (2) without probable cause; and (3) the termination of the criminal proceeding in favor of the plaintiff." J.R. Nolan & L.J. Sartorio, Tort Law § 77, at 88 (2d ed.1989).

See also Beecy v. Pucciarelli, 387 Mass. 589, 593, 441 N.E.2d 1035 (1982); *Gutierrez v. Massachusetts Bay Transportation Authority*, 437 Mass. 396, 772 N.E.2d 552, 562 (2002).

Plaintiff has failed to establish any triable issue on this count against Officer Dolan. The entire claim is premised on the allegation that Doyle "...signed a formal complaint based on information he knew, or should have known to be false and in so doing led directly to the improper institution of criminal proceedings against Mr. Burke." For the reasons set forth above,[42] plaintiff has not shown, and cannot show, that any of the information relied upon by Officer Doyle was false. Nor, again for the reasons set forth above,[43] can he show that Officer Doyle knew, or should have known, that any of the

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[41] Again (see note 40, *supra*), plaintiff, in the caption of Count 9, refers to "All defendants." When referencing particulars, however, he alleges (Complaint ¶ 97):

> James J. Dolan signed a formal complaint based on information he knew, or should have known to be false and in so doing led directly to the improper institution of criminal proceedings against Mr. Burke....

[42] See p. 10 and note 10, *supra*.

[43] See note 14, *supra*.

information upon which he relied in applying for the criminal complaint was false. Officer Dolan is entitled to summary judgment on the malicious prosecution claim (Count 9).

And to the extent that the malicious prosecution claim is brought against the remaining Town of Walpole defendants, there is not a scintilla of evidence against those other police officers. Unlike that which is specifically alleged in Paragraph 97 of the complaint,[44] plaintiff does not even allege, much less make any showing, that any of the other Town of Walpole defendants "instituted" a prosecution against the plaintiff. Only Dolan applied for the criminal complaint. Only Dolan participated in plaintiff's arrest. Plaintiff has failed to establish liability *vis a vis* the remaining Town of Walpole defendants on a claim of malicious prosecution, and those defendants are entitled to summary judgment on that count (Count 9) as well.

VII. The Pendent Intentional Infliction of Emotional Distress State Law Claim (Count 14)

In Count 14, plaintiff alleges that the conduct of the Town of Walpole defendants constituted an intentional infliction of emotional distress. Plaintiff has failed to muster any evidence whatsoever on this claim against these defendants.

Under settled precedent in Massachusetts, to make out a claim of intentional infliction of emotional distress, a plaintiff must show four elements, to wit: (1) that the defendant Walpole police officers "intended to inflict emotional distress or that [they] knew or should have known that emotional distress was the likely result of [their] conduct;" (2) that the defendant Walpole police officers' "conduct was extreme and outrageous, was

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[44] See note 41, *supra*.

beyond all possible bounds of decency and was utterly intolerable in a civilized community;" (3) that the defendant Walpole police officers' actions... were the cause of plaintiff's distress;" and (4) that "the emotional distress plaintiff sustained ... was severe and of a nature that no reasonable [person] could be expected to endure it." *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-45 (1976) (internal citations and quotations omitted).

For the reasons set forth above, plaintiff has not shown that any of the Walpole police officers committed any wrong whatsoever. He surely cannot show that they intended to inflict emotional distress on the plaintiff.

VIII. The Pendent Illegal Search, Execution, and Conversion Claim (Count 15)

To the extent that plaintiff maintains that any of the Town of Walpole police officers, as a matter of state law, are liable on account of the search of plaintiff's premises, or on account of the method of execution of that search warrant, or on account of conversion of the property seized as a result of that search, the undisputed material facts show that, as a matter of law, they are entitled to summary judgment on this claim.

For one thing, plaintiff, who chose not to brief this matter in any meaningful way, has failed to establish that Massachusetts recognizes an independent tort - apart from the constitutional tort permitted under the Massachusetts Civil Rights Act - for "illegal seizure". Indeed, it appears that it does not, *see Commonwealth v. Solis*, 407 Mass. 398, 553 N.E.2d

938 (1990),[45] and it should not be the function of this diversity court to create a cause of action under state law where none previously exists.

Moreover, there is not a scintilla of evidence suggesting that any of the Town of Walpole Police officers participated in that search. State Trooper Shea applied for the search warrant. Trooper Shea and others (but not the Town of Walpole police officers) executed that search warrant and seized whatever it is that plaintiff alleges to have been seized. At the oral argument before this court, counsel for plaintiff was unable to point to a solitary fact indicating that the Town of Walpole police officers had anything to do with the search of plaintiff 's premises on December 10, 1998 - much less that their actions (even if such actions could be shown) constituted an illegal search and seizure and/or conversion. The Town of Walpole defendants are entitled to summary judgment on Count 15.

IX. The Pendent Defamation Claim (Count 10)

As a pendent state law claim, plaintiff maintains that he was defamed by all of the Town of Walpole defendants.[46]

Officers Bausch and Kenney

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[45] In *Commonwealth v. Solis*, the Massachusetts Supreme Judicial Court observed, in the context of a case relating to extraneous contacts with jurors (*Id.* 553 N.E.2d at 940):

> Such a rule [court rule relating to extraneous contacts with jurors] would have practical teeth, unlike the more problematic prospect of establishing tort liability against a police officer who conducts an unlawful search. (Emphasis added).

That that Court thought that it would be "problematic" to "establish" an independent tort for an illegal search clearly suggests to this court that the Massachusetts courts do not recognize that as an independent cause of action.

[46] Or, at least, that is what he says in the caption of Count 10.

At the hearing on the motion for summary judgment, counsel for plaintiff was unable to point to any utterances of Officers Bausch or Kenney - much less any utterances which were defamatory in nature. The complaint does not refer to a single statement made by either Officer Bausch or Officer Kenney. And in his opposition (# 249, pp. 19-21), plaintiff limits his claim of defamation to Officers Betro and Stillman. Officers Bausch and Kenney are entitled to summary judgment on the state law defamation claim set forth in Count 10.

Officer Dolan

It is not clear whether plaintiff maintains that Officer Dolan defamed him in any respect, since plaintiff has not produced a single fact (apart from that which Officer Dolan set forth in his application for a criminal complaint and an arrest warrant) showing any public utterances whatsoever, and further because plaintiff, again in his opposition (# 249, pp. 19-21) limits his claim of defamation to Officers Betro and Stillman.

To the extent, however, that plaintiff, in the future, might maintain that that which Officer Dolan imparted to the issuing magistrate in connection with the application for the criminal complaint and arrest warrant was defamatory, Officer Dolan is entitled to judgment as a matter of law.

Under controlling Massachusetts law, to make out a claim for defamation where a statement is made about a matter of public concern,[47] a plaintiff must allege and be able to prove, among other things, that a defendant published a false and defamatory statement. *E.g.*, Yohe v. *Nugent*, 321 F.3d 35, 39-40 (1st Cir. 2003); *Dulgarian v. Stone*, 420

[47] Plaintiff cannot realistically suggest that the murder of Irene Kennedy in a local park, and the course of the investigation relating thereto, was not a matter of public concern.

Mass. 843, 847, 652 N.E.2d 603 (1995); Zortman *v. Bildman*, 1999 WL 1318959 *14 (Mass.Super. 1999).[48]

For one thing, of course, there is no evidence whatsoever that plaintiff published a false statement. To the extent that plaintiff maintains that the reported facts were false because, in plaintiff's view, the opinion rendered by Dr. Levine was not correct, plaintiff cannot, for the reasons set forth above, see Part I.10, and notes 20 and 21, *supra*, establish the falsity of that statement.

For another thing, and more importantly, that which Officer Dolan reported to the issuing magistrate in the course of the ongoing murder investigation was and is absolutely privileged. In *Correllas v. Vivieros*, 410 Mass. 314, 572 N.E.2d 7, 10-11 (1991), the Supreme Judicial Court concluded:

> Viveiros, however, admitted in her affidavit to making arguably defamatory statements to the police officer and the prosecutor during the course of the investigation of the crime, prior to the institution of formal judicial proceedings. The officers were interrogating Viveiros during their investigation of the theft. She was a suspect in that crime. Viveiros told the officers that she and Correllas had planned to steal money from the vault, that she had taken $4,000 and assumed that the additional $4,000 was stolen by Correllas pursuant to their plan. Correllas testified at her criminal trial that she had neither stolen any money nor ever discussed with Viveiros the prospect of taking money from the vault. If a jury were to believe Correllas, they could conclude that Viveiros intentionally lied to police when she made the accusations. We are asked to decide whether these statements are absolutely privileged. We hold that they are.

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[48] There that court observed (Id.):

> The elements of a defamation claim include (1) a false and defamatory communication (2) of and concerning the plaintiff which is (3) published or shown to a third party." Dorn v. Astra USA, 975 F.Supp. 388, 396 (D.Mass.1997), citing McAvoy v. Shufrin, 401 Mass. 593, 597, 518 N.E.2d 513 (1988). (Emphasis added).

> It is well established that statements made by a witness or party during trial, if "pertinent to the matter in hearing," are protected with an absolute privilege against an action for defamation. See *Aborn v. Lipson,* 357 Mass. 71, 72, 256 N.E.2d 442 (1970); *Mezullo v. Maletz,* 331 Mass. 233, 236, 118 N.E.2d 356 (1954); *Sheppard v. Bryant,* 191 Mass. 591, 592, 78 N.E. 394 (1906); *Laing v. Mitten,* 185 Mass. 233, 235, 70 N.E. 128 (1904). Important policy reasons underpin this long-standing rule. An absolute privilege is favored because any final judgment may depend largely on the testimony of the party or witness, and full disclosure, in the interests of justice, should not be hampered by fear of an action for defamation. See Restatement (Second) of Torts, § 588 comment a (1977). "[I]t is more important that witnesses be free from the fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy." *Aborn, supra* 357 Mass. at 72, 256 N.E.2d 442. A conditional or qualified privilege does not adequately protect a witness or party because he or she may still have to go to court to prove the absence of malice or recklessness. "[T]he privilege would afford small comfort ... if there was a possibility that [the witness] would be subjected in every instance to an inquiry as to his motives." *Mezullo, supra* 331 Mass. at 237, 118 N.E.2d 356.
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> An absolute privilege, and the policy considerations supporting it, may, in appropriate circumstances, apply to statements made before trial. Under Massachusetts law, statements made to police or prosecutors prior to trial are absolutely privileged if they are made in the context of a proposed judicial proceeding. See *Sriberg v. Raymond,* 370 Mass. 105, 108, 345 N.E.2d 882 (1976); *Kipp v. Kueker,* 7 Mass.App.Ct. 206, 210-212, 386 N.E.2d 1282 (1979); J.R. Nolan & L.J. Sartorio, Tort Law § 130, at 196-197 (1989). See also Restatement (Second) of Torts, *supra* at §§ 587, 588 & 598 comment e; W. Prosser & W. Keeton, Torts § 114, at 819-820 (5th ed. 1984). (Emphasis added).

In this case, the holding and rationale of the *Correllas* court ends the matter. It cannot be gainsaid - and plaintiff does not even suggest to the contrary - that Officer Dolan, at the request of the District Attorney's office, applied for the criminal complaint and arrest warrant in the context of proposed judicial proceedings as defined in *Correllas*. He is

absolutely immune from suit for defamation, regardless of his supposed motives, malice or no malice,[49] and judgment must enter in favor of defendant Dolan on Count 10.

Officer Stillman

In his opposition (# 249) to the motion for summary judgment, plaintiff says nothing helpful in terms of the manner in which Stillman defamed plaintiff.[50] This court assumes, however, that the following statements made by Stillman are claimed to be defamatory and actionable:[51]

On January 31, 1999, shortly after the District Attorney *nolle prossed* the prosecution against plaintiff, the following statements were attributed to Stillman by The Walpole Times, to wit:

1. "Meanwhile, the Walpole Police Department is intensifying its investigation into the murder, Lt. Stillman said."

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[49] In this court's report and recommendation (# 231) on motions to dismiss filed by defendants Crowley, Kessler, and Evans, on May 15, 2003, adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, G.L. c. 12, § 11H), this court recommended dismissal of the defamation count brought against defendant Crowley for want of any meaningful allegation that defendant Crowley published any false statement, or caused any false statement to be published In that report and recommendation, this court did not recommend dismissal of the defamation count - or the other state law intentional tort claims - based on the absolute privilege. But that was because defendant Crowley did not advance the argument there. Indeed, even in a motion for reconsideration filed by defendant Crowley relating to the intentional tort claims - a motion currently pending before this court and scheduled for oral argument - no claim of absolute immunity is made.

[50] All plaintiff says in his opposition is that "[p]laintiff clearly has adduced compelling evidence that false statements about him were made by the defendants." (Emphasis added). To be sure, he refers to a Local Rule 56.1 Statement, but even that reference is, at best, uninstructive. That reference is,to, at best, a hodge-podge of copies of isolated newspaper reports. This is precisely the sort of "now you see it, now you don't" approach criticized by the First Circuit in *Stepanischen v. Merchants Despatch Transportation Corporation*, 722 F.2d 922 (1st Cir. 1983), the precursor to the current Local Rule 56.1.

Although plaintiff alleges certain matters concerning the words of Stillman in ¶¶ 50 and 52 of his complaint, those allegations are not meaningful in the context of a motion for summary judgment, since it is settled that a plaintiff may not obtain a trial merely on the allegations in its complaint, *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 289-290 (1968).

[51] This assumption is based on the references in his Local Rule 56.1 Statement (# 250 -Exhibits J through M) where one newspaper report referencing Stillman is set forth as Exhibit J to # 250, and one Newsweek article (Exhibit M) is also set forth. Those are the only references to something allegedly said by Stillman.

2. "`We are really going to refocus our entire investigation and re-interview everyone'...acknowledging that DNA evidence and a palm print taken from the victim's body has excluded Burke."
3. "Stillman did point out, however, that bite marks taken from Mrs. Kennedy's body matched Burke's dental profile, according to one of the nation's top forensic dentists."
4. "While there is a possibility that Burke had an accomplice, Stillman said, it is unlikely that someone other than Burke committed the murder, based on the bite marks."
5. "`You can't get around the forensic (identification),' the lieutenant said. 'You can't deny they exist.'"
6. "Meanwhile, Stillman is urging those who have any information to come forward."
7. "`Now is the time to call us," he said. `I really think that there are people out there who know things. We need every bit of information we can possibly get.'"
8. "Responding to accusations that the Walpole Police Department has been ineffective in this case, the lieutenant said: `From the onset of this investigation we tried very hard to elicit information from the public about anything they saw or heard unusual. We followed up on every one of those reports.'"
9. "Some reports confirmed that the victim's husband wasn't involved; some led police to Burke; and some led police to other individuals, Stillman said."
10. "`We were given enough information to identify people who had something to do with the murder,' the lieutenant said. `In no case did we say that we're focusing on Burke only.'"
11. "`We were very open and willing to accept any evidence that led us anywhere. We just wanted any information that would help lead us to the truth.'"
12. "Once the bite mark evidence came back from the lab, Stillman said, police were able to obtain an arrest warrant and search warrant in conjunction with State Police and the district attorney's office - `based on ample probable cause.'"
13. "Furthermore, investigators were drawn to the suspect after scent dogs led them from the murder scene to Burke's front door."
14. "At that point, Stillman said, the authorities considered Burke to be the murderer."
15. "`Nothing was done wrong,' Stillman said. `Everything that could have been done was done. Every bit of information was checked out.'"
16. "But because the DNA and palm print evidence has apparently excluded Burke, Stillman added, `Obviously we are considering and looking for any other information involving anyone else.'"
17. In a single quote set forth in a Newsweek article captioned "Gettting the Wrong Man", Stillman is quoted as having said (after plaintiff's release), "We could not have foreseen the way it was going to go."

As indicated above, it is not enough to contend that the words attributable to Stillman were defamatory. To the contrary, in matters of public concern, a plaintiff must also show

that the statements are false. Yohe v. *Nugent*, 321 F.3d 35, 39-40 (1st Cir. 2003); *Dulgarian v. Stone*, 420 Mass. 843, 847, 652 N.E.2d 603 (1995). It cannot be seriously contended, if contended at all, that the matter on which Stillman spoke was a matter of public concern. After all, plaintiff had just been released, and there was, in the eyes of the general community, as well as the law enforcement community, a vicious killer on the loose, a killer who had murdered an elderly woman as she strolled in a public park.[52]

Apart from a recitation of hornbook law in his opposition (# 249, pp.19-21), plaintiff has laid no meat to the bone. He has not suggested which, if any, of the statements referred to above, were false. Insofar as this court can determine, each of the attributed statements (1 through 16 above) are true, and certainly have not proved to be false by any record evidence marshaled by the plaintiff. In matters of public concern, it is not incumbent for Stillman to establish the truth of the statements attributed to him. To the contrary, the burden is on the plaintiff to show that "...each allegedly defamatory statement is materially false." *Yohe*, *supra*, at 41 (Emphasis added); *Dogarian*, *supra*, 420 Mass. at 847. On this, plaintiff did not even attempt to disclose anything whatsoever to show that any of the allegedly defamatory statements were materially false. All plaintiff has done was to plaster one newspaper article as an exhibit, leaving it for this court to divine the truth or falsity of any of the statements. That is clearly not enough.

And to the extent that plaintiff contends that Stillman, in any of the statements above attributed to him, improperly opined that plaintiff was the murderer, plaintiff fares no better. And that is because, under settled Massachusetts law, expressions of opinion based on

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[52] The Walpole Times article referred to above was under the caption "Burke no longer in custody".

disclosed or assumed nondefamatory facts - and not on undisclosed facts - are privileged. Put another way:

> An "expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified or unreasonable the opinion may be or how derogatory it is." (Emphasis added).

Yohe, *supra*, at 42 (quoting from *Dulgarian*, *supra*, 420 Mass. at 850-51).

Insofar as this court can determine, and plaintiff has not taken the laboring oar on this matter of opinion versus fact in any meaningful respect, to the extent that any of the statements set forth above which are attributable to Stillman are expressions of his [Stillman's] belief that they had booked the right person when they arrested plaintiff, none of those expressions of opinion implied the allegation of undisclosed defamatory facts as the basis for those opinions. Those statements, therefore, are not actionable for defamation.[53]

Officer Stillman is accordingly entitled to summary judgment on the defamation claim (Count 10).

Chief Betro

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[53] Plaintiff, in his opposition, sets up, and then argues against, a straw man. He says (Opposition # 249, pp. 20-21) that, at best, the statements of Stillman were conditionally privileged, and that Stillman abused the privilege. Apparently (although it surely is not clear, given the precious little he has said on the matter), in referring to *Jones v. Taibbi*, 400 Mass. 786, 795 (1987), plaintiff refers to the "fair report" privliege. But qute apart from the fact that plaintiff has shown nothing in terms of abuse of a privilege (*i.e.*, he has not shown any excessive publication or actual malice on the part of Stillman), this is not, quite simply, a matter of privilege. In matters of opinion and statements made relating to a public concern, to give the First Amendment breathing room, *Draghetti*, *supra*, and similar Massachusetts cases speak in terms of actionable defamation, not in terms of privilege. Indeed, that is particularly true in terms of statements of opinion, since an "...'expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified or unreasonable the opinion may be or how derogatory it is.'" *Yohe*, *supra*, at 42, quoting from *Dulgarian*, *supra*, 420 Mass. at 850-51. (Emphasis added).

In his opposition (# 249) to the motion for summary judgment, plaintiff, again, says precious little as to the manner Chief Betro defamed him.[54] This court assumes, however, that the following statements made by Betro are claimed to be defamatory and actionable:[55]

1. In a Boston Globe article dated January 22, 1999 (after plaintiff had been released) (Exhibit K to # 250), the following attribution: "Walpole Police Chief, confident last night that the right man was in custody, told residents at a town meeting that it was possible Edmund Burke had tainted his saliva with orange juice, thereby tricking the DNA testers."[56]
2. Referring to the same public meeting referenced in the immediately preceding paragraph, a Boston Herald article dated January 25, 1999 (Exhibit M to # 250) reported the folloiwng: "While [District Attorney] Keating is treading lightly on the subject of Burke's guilt, Walpole Police Chief is publicly insisting that investigators have arrested Kennedy's killer...`I can tell you we've got the right man,' Betro told about two dozen people who gathered Wednesday night for the East Walpole Civic Association meeting, according to the Daily Transcript in Dedham...Betro explained away the DNA results that excluded Burke this way: drinking liquid before you bite someone can wash away cells in the mouth that contain DNA, according to the published report...Betro, who did not return a telephone call yesterday, told the crowd that an orange juice container was found about 40 feet from Kennedy's body, and it was possible Burke drank the orange juice and washed away any DNA samples in his mouth, according to the Transcript article."

Once again, however, as in the case of Stillman, these statements attributed to Chief Betro were made at a public meeting held responsive to the fact that plaintiff, believed to be the killer of Mrs. Kennedy, had just been released from custody, and a killer was

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[54] Again, all that plaintiff says in his opposition is that "[p]laintiff clearly has adduced compelling evidence that false statements about him were made by the defendants." (Emphasis added), with the less than helpful reference to his Local Rule 56.1 statement.

[55] This assumption is based the references to his Local Rule 56.1 Statement (# 250 -Exhibits J through M) where two newspaper reports referencing Betro are set forth.

[56] That attribution was immediately followed by the following paragraph in the same article authored by the Globe Staff member who authored that article:

> Not likely. In the highly complex world of DNA testing, the idea that the results could be manipulated by juice is not reasonable, according to several scientists at laboratories who conduct the tests.

apparently still on the loose. Those statements were obviously made as matters of public concern. To the extent that plaintiff contends that, by these statements, Chief Betro improperly opined that they had the right man when they arrested plaintiff, plaintiff, once again, has failed to point to a single undisclosed defamatory fact upon which that opinion was based. To be sure, plaintiff says (and this court assumes for the purposes of this motion for summary judgment) that Chief Betro clearly did not understand the dynamics of DNA testing when he suggested that saliva could be doctored to elude DNA testing by drinking orange juice. But being wrong is simply not enough in opining as to matters of public concern. Any expression of opinion as to matters of public concern - even clearly erroneous opinions - are not actionable if those opinions are based on disclosed, albeit false, facts. In this case, the erroneous premises - *i.e.*, that saliva could be doctored to elude DNA testing by drinking orange juice - was disclosed in all of its naked attributes. An informed public could be expected to accept or reject that premise and reach its own conclusions about the guilt *vel non* of the plaintiff. These statements are not actionable as defamation, and Chief Betro is entitled to summary judgment on the defamation count (Count 10).

X. The Pendent Invasion of Privacy Claim (Count 16)

As a pendent state law claim, plaintiff, in Count 16, generally alleges that all of the Town of Walpole defendants invaded his privacy.

In his opposition to the defendants' motion for summary judgment, plaintiff makes no argument whatsoever as to this claim. In these circumstances, the claim of invasion of

privacy should be considered as waived against the Town of Walpole police officers. *See e.g.*, *United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir. 1997).[57]

In any event, plaintiff has not made, and cannot make, a claim of invasion of privacy against the Town of Walpole police officers. Under settled Massachusetts law, among other things, in order to make out an invasion of privacy claim, a plaintiff must show, not unlike a claim for defamation, that the defendant "published" the alleged statements, and, in addition, that the facts so published were private facts. *Dorn v. Astra USA*, 975 F.Supp. 388, 396 (D.Mass.1997). In this case, plaintiff has not marshaled a single fact indicating that any of the Town of Walpole police officers published a private fact. All of the Town of Walpole defendants are entitled to summary judgment on Count 16.

XI. The Pendent Vicarious Liability (Count 11)

In Count 11, plaintiff alleges that "[t]o the fullest extent allowable under any theory of law,[58] the Town of Walpole is vicariously liable for the acts of its agents, servants and employees, including all persons named as defendants, but also including any other

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[57] There that Court observed (*Id.*):

> To make a bad situation worse, the appellant's briefs in this court advance these alleged constitutional violations in vague and cryptic terms. Appellate judges are not clairvoyants, and it is surpassingly difficult for us to make something out of nothing. *Cf.* William Shakespeare, King Lear act 1, sc. 4 (1605). We have steadfastly deemed waived issues raised on appeal in a perfunctory manner, not accompanied by developed argumentation, *see*, *e.g.*, *Martinez v. Colon*, 54 F.3d 980, 990 (1st Cir.), *cert. denied*, 516 U.S. 987, 116 S.Ct. 515, 133 L.Ed.2d 423 (1995); *Ruiz v. Gonzalez Caraballo*, 929 F.2d 31, 34 n. 3 (1st Cir.1991); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990), and this case does not warrant an exception to that salutary practice. "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work...." *Zannino*, 895 F.2d at 17.
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> To that, this court would only add that district judges, like appellate judges, are not clairvoyants. And the addenda that that is particularly true where a party makes no argument at all.

[58] Notwithstanding the broad allegation, however, plaintiff has chosen not to brief any theory of law in his opposition to defendants' motion for summary judgment.

persons[59] involved in the unconstitutional and otherwise flawed investigation and aborted prosecution of Edmund F. Burke."

To the extent that plaintiff contends that the Town of Walpole is vicariously liable for the "constitutional" torts of the Town of Walpole police officers, a matter discussed elsewhere in this Report and Recommendation, pp. 21-21, he cannot recover on a theory of respondeat superior or vicarious liability. *Monell v. New York City Dep't. of Social Servs.*, 436 U.S. 658 (1978).

To the extent that plaintiff contends that the Town of Walpole is vicariously liable for the other intentional torts of the Town of Walpole police officers set forth as pendent state law claims (putting to one side that, for the reasons set forth above, plaintiff has not shown that any Town of Walpole officer committed an actionable intentional tort), the Town of Walpole, as a municipality, is immune from suit for the intentional torts of its officers and employees under the provisions of G.L. 258, § 10(c). *E.g.*, *Boulais v. Commonwealth of Massachusetts*, *supra*; *Mellinger v. Town of West Springfield*, 401 Mass. 188, 515 N.E.2d 584, 589 (1987); *Camoscio v. Hanley*, 1996 WL 1353296 *2 (Mass.Super. April 3, 1996).

And finally, to the extent that plaintiff means, by way of his claim set forth in Count 11, that the Town of Walpole is liable for the negligence of its officers and employees, a theory certainly not advanced in his opposition, see note 57, *supra*, the long and the short of the matter is that that claim is brought in the wrong court. Although the Commonwealth has waived sovereign immunity *vis a vis* claims brought against a municipality based on the negligence of the officers and employees of municipality, see the Massachusetts Tort

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[59] Plaintiff has chosen not to identify any such other persons.

Claims Act, G.L. 258, 258, §§ 1 *et seq.*, it has not consented to a trial of such claims in the federal courts.

Under settled principles, although the Massachusetts Tort Claims Act provides a waiver of "sovereign immunity", it is only a limited waiver. And the Massachusetts Supreme Judicial Court, in response to a certified question posed by this Court,[60] has unequivocally held that that waiver extends only to suits brought in the courts of the Commonwealth of Massachusetts, and not suits brought in a federal district court or forum outside of the Massachusetts state courts. *Irwin v. Commissioner of Youth Services*, 388 Mass. 810, 448 N.E.2d 721 (1983); *Boulais v. Commonwealth of Massachusetts*, *supra*. Count 11, to the extent that it may sound in vicarious liability for negligence, must be dismissed without prejudice for want of subject matter jurisdiction.

XII. Conclusion

For the reasons set forth above, this court recommends[61] that the district judge to whom this case is assigned allow the motion for summary judgment (# 217) filed by the defendants Town of Walpole and defendants Town of Walpole Police Officers (Betro, Stillman, Dolan, Bausch, and Kenney) in all respects.

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60 *Irwin v. Calhoun*, 522 F.Supp. 576 (D.Mass. 1981).

61 The parties are hereby advised that under the provisions of Rule 72(b) of the Federal Rules of Civil Procedure and Rule 3(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file specific and written objections thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); United States v. Emiliano Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-379 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also, Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466 (1985).

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
00-10376-GAO
00-10384-GAO
00-12541-GAO

EDMUND F. BURKE

Plaintiff

v.

TOWN OF WALPOLE, ET AL.

Defendants

REPORT AND RECOMMENDATION
ON DEFENDANTS MATTALIANO, SHEA,
McDONALD, JENNINGS, AND BUCK LEY'S
MOTION FOR SUMMARY JUDGMENT

October 6, 2003

COHEN, M.J.

This is a civil rights case with pendent state law claims. The action is brought against some seven named Massachusetts State Police Officers, various and sundry "John Does", "Other Officials of the Commonwealth of Massachusetts", the Commonwealth of Massachusetts, the Town of Walpole, police officers from the Town of Walpole, and various

forensic examiners, including defendants Crowley, Kessler, Evans, and Levine[62] in Civil Action No. 00-10384-GAO.[63]

Generally speaking,[64] the underpinnings of this case began with the murder of one Irene Kennedy in Walpole, Massachusetts. The crime scene search indicated that Mrs.

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[62] This and the related cases have a rather tortuous procedural history. Plaintiff initially commenced suit against the Town of Walpole, certain police officers of the Town of Walpole, and Dr Levine, in the Norfolk County Superior Court. That action was removed to this court on motion of the Town of Walpole and Town of Walpole Police Officers under Civil Action No. 00-10376-GAO. Sometime later, in that same state court action, defendant Levine filed a similar notice of removal to this court. Instead of being consolidated, then and there, with Civil Action No. 00-10376-GAO, that removal was docketed as Civil Action No. 00-12541-GAO. In the meantime, plaintiff brought direct suit (*i.e.*, not a removed action) against various Massachusetts State Police Officers and the Commonwealth of Massachusetts under Civil Action No. 00-10384-GAO. On a later occasion, all of the cases were consolidated under 00-10376-GAO, and subsequent amendments to the pleadings (including an amended complaint, a second amended complaint, and a third amended complaint) have been made under Civil Action No. 00-10376-GAO.

Plaintiff has also brought suit against a forensic dentist employed by the Massachusetts Medical Examiner (Dr. Kathleen M. Crowley) and two others (Kessler and Evans) in the Massachusetts Medical Examiners Office. Those claims were brought under Civil Action No. 00-10376-GAO after consolidation. The action brought against Dr. Lowell Levine was brought, as previously indicated, under Civil Action No. 00-10384-GAO, as a removed action. In Civil Action No. 00-10376-GAO, defendants Crowley, Kessler and Evans, filed a motion to dismiss. That motion, in turn, was referred to this court for report and recommendation under the provisions of Rule 2(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts. This court issued a report and recommendation on that motion on or about May 15, 2003 (adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, (G.L. c. 12, § 11(H)), and this court has also issued a report and recommendation on the motion to dismiss and/or for summary judgment brought by defendant Levine. Indeed, the latter report and recommendation involved, in many respects, the same factual findings and legal conclusions as are presented in this motion, and this court, rather than reinvent the wheel for no purpose whatsoever, borrows heavily, often verbatim, from the report and recommendation issued with respect to the motion for summary judgment filed by Dr. Levine.

The remaining defendants (*e.g.*, the Town of Walpole and various and sundry Walpole Police Officers in Civil Action No. 00-10384-GAO and 00-12541-GAO) have also filed motions for summary judgment. With the exception of the motion to dismiss filed by the Commonwealth of Massachusetts (which was continued on account of the unavailability of counsel for the Commonwealth), this court heard all other motions on the same day as it did with respect to the motion referred to in this Report and Recommendation. A Report and Recommendation as to the motions filed by the Town of Walpole and its police officers will follow this report and recommendation in a separate report and recommendation, as will a report and recommendation on the motion to dismiss filed by the Commonwealth of Massachusetts.

[63] The original complaint in Civil Action No. 00-10384-GAO, remains the current complaint. Plaintiff has, however, twice amended his complaint in Civil Action No. 00-10376-GAO, and the current complaint in that case is the Third Amended Complaint.

[64] A more detailed description of the material undisputed facts as found by this court are set forth where relevant to the issues raised by the motion and opposition thereto. In all respects, the general background facts, as well as the findings of material undisputed facts, made herein mirror those set forth in the report and recommendation on defendant Lowell Levine's motion to dismiss and/or for summary judgment entered previously hereto.

Kennedy had multiple stab wounds, from which she died. A possible bite mark was observed on her breast, and photographs of that bite mark were made. At some point during the investigation, investigators of the Massachusetts State Police focused their investigation towards the plaintiff, Edmund F. Burke. Plaintiff voluntarily provided certain forensic materials to the State Police, and voluntarily provided a dental impression to Dr. Crowley, then (and now) a forensic dentist assigned to the Medical Examiner's Office of the Commonwealth of Massachusetts. That dental impression, in turn, together with the photographs of the bite mark found on Mrs. Kennedy's breast, was forwarded to Dr. Lowell Levine (hereinafter "Levine" or "Dr. Levine"). Dr. Levine opined that the dental impressions voluntarily given to Dr. Crowley by plaintiff matched the bite marks observed on the body of the victim, Mrs. Kennedy. Based on that, and other information, the Massachusetts State Police, by and through the offices of the District Attorney, applied for and received an arrest warrant for the plaintiff. Plaintiff was subsequently arrested, and was held in custody. Thereafter, at or about the same time, a forensic DNA examination was conducted in a State of Maine laboratory, and that DNA examination apparently cast doubt on the contention that Burke murdered Kennedy.[65] Based on a *nolle prosequendum* filed some forty days thereafter by the District Attorney, plaintiff was released from custody.

At bottom, insofar as relevant here, plaintiff alleges that the conduct of all of defendants, including the defendant police officers of the Town of Walpole, caused his improper arrest, continued detention, and search of his premises, in violation of his Fourth

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[65] This conclusion by the Maine laboratory was brought to the attention of the initial arraignment judge in the state court on December 11, 1998, the day after plaintiff's arrest. Notwithstanding that, the district judge ordered plaintiff held without bail.

Amendment rights and Fifth Amendment rights (Counts 1, 3, and 13). He also alleges pendent state law claims.

Defendants herein (Mattaliano, Shea, McDonald, Jennings, and Buckley), all members of the Massachusetts State Police, and defendants in Civil Action No. 00-10376-GAO, have filed a motion for summary judgment (# 256) contending, among other things, that the undisputed material facts shows that their conduct did not violate any rights of the plaintiff, constitutional or otherwise. And, to the extent that plaintiff's claims against them sound in civil rights claims, these defendants further contend that they are entitled to, at the very least, qualified immunity.

I. Material Undisputed Facts vis a vis Claims These Defendants

To the extent that plaintiff brings claims against defendant State Police Officers, this court finds the following material facts to be undisputed:

1. All of the defendant State Police Officers were assigned sundry and various duties in connection with the investigation of the murder of Irene Kennedy;
2. During the course of the investigation of the death of Irene Kennedy, photographs of a bite mark on Mrs. Kennedy's breast were taken, and plaintiff provided the police with his dentition;
3. Dr. Lowell Levine was and is a leading forensic dentist[66] with a practice in New York State. As a forensic dentist, he has examined "thousands and

[66] Indeed, on one occasion, the expertise of Dr. Levine was sought by Jeffrey Denner, Esq., who represented the plaintiff in the underlying criminal case, and who serves as counsel for plaintiff in this case. Plaintiff's Statement Per Local Rule 56.1 Submitted on Behalf of Edmund Burke (# 228, ¶ 11) (hereinafter "Plaintiff's Statement of Undisputed Facts"), Exhibit C, p. 28. Exhibit C includes the deposition of Dr. Levine taken by counsel plaintiff, and is hereinafter referred to as the "Levine Deposition".

thousands" of dentitions.[67] He was and is a diplomate and a fellow of the American Board of Forensic Odontology (hereinafter "ABFO"),[68] being one of the founding diplomates of the ABFO.[69] And because of his experience

4. Dr. Levine was retained by the Norfolk County District Attorney's office to give an opinion as to the origin of the bite mark on Mrs. Kennedy's breast;

5. On or about December 6, 1998, based on that which had been provided to him, including plaintiff's dentition, Dr. Levine opined that, as of that date, he was unable to positively state to a reasonable degree of scientific certainty that plaintiff was the source of the bite mark.

6. Thereafter, Dr. Levine was provided with additional photographs of the bite marks found on Mrs. Kennedy's breast. Based on these photographs, Dr. Levine opined with a reasonable degree of scientific certainty[70] that plaintiff caused the bite marks on Mrs. Kennedy's breast.

7. State Police officer Steven McDonald was advised by Dr. Levine that, in his [Levine's] opinion, it could be said with a reasonable degree of scientific certainty that plaintiff caused the bite marks on Ms. Kennedy's breast.[71]

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67 Levine Deposition, p. 41.

68 Plaintiff's Statement of Undisputed Facts. ¶ 11.

69 Levine Deposition, p. 42.

70 Dr. Levine construed the term, "reasonable degree of scientific certainty", as a "high degree of probability".

71 Dr. Levine testified that he usually qualifies his opinions by indicating that the phrase, "reasonable degree of scientific certainty', means a "high degree of probability". But he could not recall if he conveyed that language when he spoke to Trooper McDonald on the telephone. We accordingly assume, for purposes of this motion for summary judgment, that Dr. Levine did not convey that cautionary caveat.

8. This opinion was reported to Walpole Police Officer James Dolan [a defendant herein] who, in turn, after the District Attorney had concluded that the plaintiff should be arrested, incorporated that opinion in a report submitted to a clerk-magistrate of the Wrentham District Court in connection with the filing of a criminal complaint and the issuance of an arrest warrant.[72] In preparing that report for the clerk magistrate, Officer Dolan had no reason to believe that the opinion rendered by Dr. Levine was anything but accurate.[73] That opinion was also reported to State Police Officer Scott

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[72] The report prepared in connection with the application for an arrest warrant (Docket # 67, Deposition Exhibit 32A through the top of 32B) consisted of some seventeen (17) pages of incident reports, and was replete with matters and evidence suggesting that there was probable cause to believe that the plaintiff murdered Irene Kennedy. In terms of forensics and other indicia of probable cause, the applying officer indicated that:

> On 12-01-98 Irene Kennedy was brutally murdered in Bird Park. A State Police K-9 unit conducted a track from the victim. The K-9 lead directly to Edmund Burke's front door at 315 Pleasant St.
>
> Edmund was interviewed and he said that he had been sleeping all morning. Our investigation revealed two independent witnesses who saw him outside of his house in his yard on the morning of the murder. They also described the clothing he was wearing. He has denied owning clothing of this type.
>
> Edmund has changed his story several times during the course of this investigation to try and explain his actions. They are all inconsistent.
>
> Preliminary autopsy reports indicated that Irene Kennedy had been bitten on her breasts. These bites appear to be human. They were examined by Forensic Dentist Kate Crowley of the Medical Examiners Office and compared to impressions of Edmund Burke's teeth.
>
> She requested that Dr. Lovell Levine examine them also. He is the leading expert in the country and has testified as such. He is a Forensic Dentist with over thirty years of experience. He determined that the marks were bite marks made by human teeth. He has also determined with reasonable scientific certainty that the they [sic] were made by Edmund Burke. (Emphasis added).
>
> Based on the above facts, there is probable cause to believe that Edmund Burke entered Bird Park on the morning of 12-1-98 and brutally murdered Irene Kennedy. I am requesting a warrant for his arrest for murder.

[73] That is to say, there is not a scintilla of evidence showing - indeed, not even a conclusory allegation - that Officer Dolan had any reason to question the expertise of the opinion rendered by Dr. Levine, someone whom he [Dolan] considered to be the leading forensic expert in the field of dentistry in the country. *See* (continued...)

Jennings who, in turn, incorporated that opinion in an affidavit filed in connection with an application for a search warrant to search defendant's premises on December 10, 1998.

9. The clerk-magistrate of the Wrentham District Court, upon receipt of Officer Dolan's report, issued a warrant of arrest. The plaintiff's arrest was based on and pursuant to that arrest warrant.[74]

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[73] (...continued)
note 11, *supra*.

[74] When this court issued its report and recommendation (# 231) on motions to dismiss filed by defendants Crowley, Kessler, and Evans, on May 15, 2003, adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, (G.L. c. 12, § 11(H)), there was a question remaining as to whether a warrant of arrest had issued. See Report and Recommendation (# 231, p. 12 and n. 17). Since that time, based on additional matters submitted in connection with the various and sundry motions for summary judgment, this court finds and concludes that all of the relevant and material evidence points to but one conclusion as a matter of law - that the warrant had issued prior to plaintiff's arrest. That is to say, all the material evidence would not permit a reasonable trier of fact to conclude that plaintiff's arrest was not made pursuant to a warrant.

Officer Dolan testified at his deposition that he applied for an arrest warrant, and that that arrest warrant was issued by Clerk Magistrate Edward Doherty on December 10th. The arrest warrant and return thereon has been submitted as an exhibit (Exhibit U to the Statement of Undisputed Facts (# 219) filed by the Town of Walpole and its various police officers) and # 259, Exhibit U. The first docket entry - entitled to conclusive effect in the absence of a showing to the contrary, *Howard v. Local 74, Wood, Wire and Metal Lathers International*, 208 F.3d 930, 934 (7th Cir. 1953) - in plaintiff's underlying criminal case indicates that he was arrested on a warrant. (# 259, Exhibit U). State Police Officer Kevin Shea, in response to a question put to him at a deposition by counsel for the plainttiff, testified that the arresting officers had a warrant at the time they arrested the plaintiff (# 259, Exhibit D - Deposition of Kevin Shea, pp. 138-139). Plaintiff has proffered nothing of substance which even remotely suggests to the contrary. All he says is that Town of Walpole Police Chief testified to the contrary. The rather quixotic portion of the testimony he relies upon, however, hardly says that a warrant was not issued before the arrest. When asked when he [Chief Betro] formed an opinion as to the guilt of plaintiff, Chief Betro testified (Town of Walpole Statement of Undisputed Facts (# 219, Exhibit W, p. 89))

> Well, after the arrest was made I was informed as to, I was not privy at that time to any meetings which were, or any, that were going on in my station with the District Attorney and the state police and my detectives, as well. The decision was made to seek an arrest warrant. After the fact I was told to seek an arrest warrant. (Emphasis added)

Plaintiff excerpts the underscored above for the remarkable position that a warrant was not issued before the arrest of the plaintiff. What plaintiff omits, however, is that which immediately follows in that same answer, to wit:

> An Affidavit was put together by the state police and an arrest warrant, Detective Dolan went to court to obtain the warrant and they went down to make the arrest. At that point in time I was informed they were going down to arrest Ed Burke. (Emphasis added).

(continued...)

10. At or about 11:00 a.m., December 10, 1998,[75] and before Officer Dolan applied for the arrest warrant, an employee at the Maine State Laboratory reported to two Massachusetts State troopers that DNA analyses concluded that the saliva found at the scene of the crime was not that of the plaintiff. That information was not made known to Dr. Levine at any time prior to his rendering his opinion, or, indeed, prior to the arrest of the plaintiff.[76] Nor was

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[74] (...continued)
In context, plaintiff cannot, from this, realistically suggest that the warrant was issued after plaintiff's arrest. It is but a line taken out of context in connection with a question put concerning an entirely different matter and, purposefully or otherwise, left in an ambiguous state by the examiner - in this case, counsel for the plaintiff.

[75] There is a question as to this date. Other evidence suggests that Trooper McDonald became aware of the DNA reports on December 11, 1998, after plaintiff's arrest, and not on December 10, 2003. State Police officer Kevin Shea testified at his deposition that he was first notified of this fact by Trooper Steven McDonald on December 11 - the date of plaintiff's arraignment, and that he [Shea] immediately relayed that information to the prosecutor who, in turn, advised plaintiff's defense counsel and the arraignment judge. For purposes of the motion for summary judgment, however, this court assumes the December 10th date.

[76] In his opposition in this case (# 262, p. 5), plaintiff misrepresents the record in suggesting that Dr. Levine was aware of the DNA report before the arrest of the plaintiff. Plaintiff says (# 262, p. 5):

> At 11:00 a.m., on the morning of December 10, 1998, Theresa Callichio of the Maine State Police Lab informed Trooper McDonald that the DNA excluded Mr. Burke. McDonald claims that he told at least two people of this call, Assistant District Attorney John Kivlan, (a prosecutor) and Lowell Levine. Lowell Levine, in an astonishing display of arrogance, immediately assumed that the DNA must have been contaminated, and told that to McDonald. Deposition Transcript of Steven McDonald, p. 109, appended as Exhibit L to Defendant Mattaliano, Et Al's Statement of Undisputed Facts. (Emphasis added).

Putting to one side plaintiff's unsupported oratory ("an astonishing display of arrogance"), which is not apparent from the record, and putting to one side plaintiff's erroneous reference (there is no p. 109 to the Deposition transcript appended as Exhibit L - this court, however, searched other submissions and found page 109 in the Deposition of Steven McDonald at Exhibit I of plaintiff's own earlier opposition (# 228) to the motion to dismiss or for summary judgment filed by defendant Levine), the suggestion that Levine was aware of the DNA report before the arrest of the plaintiff is erroneous, at best, deceiving, at worst. In fact, as it shows without equivocation on page 108 of that same deposition, that conversation was held on December 11, after plaintiff's arrest, at or about the time of arraignment, to wit:

Q. Okay. Now let's get back to Lowell Levine, you have this conference with Levine on the day of arraignment?
A. Correct.

Counsel for plaintiff, who asked the very question, and who received the very answer, surely must have known better to suggest, in a misleading way, that Levine (or anyone else except, perhaps, Trooper Steven McDonald) knew anything about the DNA reports before the arrest of the plaintiff.

(continued...)

that information made known to Officer Dolan before he applied for the arrest warrant, or to any arresting officer until after the arrest of the plaintiff.[77]

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[76] (...continued)

Elsewhere, in a similar vain, counsel for plaintiff allows in his opposition to the motion for summary judgment filed by the Massachusetts State Police officers (# 262, p. 5):

> Later that afternoon, McDonald told Levine that the police still desired to arrest Mr. Burke and the decision hinged on Levine's willingness to stand by his previously drawn conclusions. Id. at 130.

The reference to page 130 of the McDonald deposition transcript, however, says no such thing. This court's reading of the entirety of the McDonald affidavit reveals nothing of the sort. It is, again, something that plaintiff has woven from whole cloth without any regard to the true state of the record before this court. While plaintiff may wish to roll his dice before a jury, a consistent theme throughout his oppositions, see note 20, *infra*, he may not take liberty with the record and misrepresent that record to bring his case before a jury.

[77] At the hearing before this court, which included motions for summary judgment filed by all the parties (excepting Crowley, Kessler, Evans, or the Commonwealth of Massachusetts), counsel for plaintiff, while unable to point to any factual support, argued, for the first time, insofar as this court can determine, that it could be reasonably inferred that since Trooper Steven McDonald and Trooper Robert Martin received the information concerning the DNA testing on December 10, 1998, one or the other imparted that same information to Officer Dolan prior to the time that he applied for the arrest warrant, and prior to the time that plaintiff was arrested. Until the hearing on the motions, plaintiff had not even alleged that Officer Dolan was made aware of the DNA report.

That, however, is pure speculation and conjecture - a suggestion woven from whole cloth, and nothing else. Indeed, the only evidence which plaintiff has discovered on this matter is that, whatever the date Trooper McDonald may have thought that he received that information, he did not impart that information to anyone until December 11, 1998, the day after plaintiff's arrest, and, then, only to Massachusetts State Trooper Kevin Shea and Assistant District Attorney John Kivlan - not to Officer Dolan at any time. Nothing could be clearer from the testimony of Trooper Steven McDonald, upon which plaintiff relies as suggesting that Trooper McDonald was aware of the DNA tests on December 10, to wit (Exhibit I to Plaintiff's Local Rule Statement (# 228 - Deposition of Steven McDonald, pp. 108-109):

A. I spoke with the Maine state police directly, the lab.
Q. And they told you they excluded him [Burke]?
A. Excluded. The profile does not match.
Q. And it's your testimony you communicated that immediately to John Kivlan?
A. Yes.
Q. Do you know as you sit here one way or the other whether that was communicated to the Judge at the arraignment.
A. I don't know. I talked to – Sergeant Shea was at the arraignment with [Assistant District Attorney] Jerry Pudolsky who was the ADA handling the case and I also spoke with Kevin and let him know what was going on.
Q. Did you speak to Pudolsky directly?
A. No, I did not. John Kivlan and Jerry Shea were the two I spoke to.

And that arraignment attended by ADA Pudolsky and Trooper Shea, of course, was held on December 11, the day after plaintiff's arrest. Town of Walpole's Local Rule 56.1 Statement (# 219 - Exhibit N (Deposition of Kevin Shea, pp. 143-144)); Town of Walpole's Local Rule 56.1 Statement (# 219 - Exhibit V (Deposition of Gerald Pudolsky, pp. 37-43). State Police Officer Shea also testified that he first learned of the DNA results on December 11 - the day of the arraignment, and not on the day of arrest (# 259, Exhibit D - (Deposition of Kevin Shea, p. 143)).

(continued...)

11. As of the present time, Dr. Levine remains of the opinion to a reasonable degree of scientific certainty[78] that the bite mark on the breast of Ms. Kennedy matched the dentition of the plaintiff. And plaintiff has proffered no

[77] (...continued)

Indeed, at a continued deposition of Trooper Steven McDonald noticed by counsel for plaintiff, Trooper McDonalld testified unequivocally that he first learned of the negative DNA analyses on December 11, 1998, the day of plaintiff's arraignment, and the day after his arrest. Plaintiff's Statement of Undisputed Facts (# 250, (Exhibit O - Deposition of Steven McDonald, p. 54)).

[78] As Dr. Levine (then and now) understood that phrase, to wit: a "high degree of probability."

meaningful evidence to the contrary,[79] putting to one side the mere *ipse dixit* of counsel for plaintiff.[80]

II. The Summary Judgment Standard

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[79] Consistent with discovery and other scheduling deadlines, first imposed by the district judge to whom this case is assigned, and later by this court on motions for extensions of time, the plaintiff did not designate any expert on the matter of forensic dentistry or bite mark comparisons.

In terms of actual evidence, plaintiff only proffered his own lay opinion, to wit: "It is scientifically impossible for my dentition to match bite marks found on Irene Kennedy's body." (Affidavit of Edmund F. Burke, # 227, ¶ 6), and evidence of the fact that DNA analyses excluded plaintiff as the owner of the saliva found on Mrs. Kennedy's body. The Burke Affidavit says nothing, since there is nothing whatsoever showing that he is qualified to give any sort of scientific opinion. So, too, with the DNA evidence. That augured against a match of saliva, but it did not, and still has not, shown that Dr. Levine's opinion was or is inaccurate to a reasonable degree of scientific certainty.

Plaintiff has one more arrow in his sheath in an attempt to suggest to the contrary. Contrary to prior orders of this court relating to the designation of experts, plaintiff attempted to do indirectly that which he could not do directly. He submitted his Supplemental Opposition to Lowell Levine's Motion for Summary Judgment (# 226), something which plaintiff describes as a timely filed "Rule 26 Report and Affidavit of Richard Souviron, D.D.S. We do not know what plaintiff means by saying that this filing was timely. It was not.

On February 27, 2003, given the fact that plaintiff has had more than three years in which to prepare his case, this court, by Order (# 208) of that same date, denied plaintiff's motion for an extension of time to designate experts (# 205). Plaintiff did not seek any review of that Order (# 208) by the district judge to whom this case is assigned consistent with the provisions of Rule 72(a), F.R. Civ. P. or Rule 2(a) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts. Instead, some two months later, he filed a motion for reconsideration (# 213) of that earlier order. On April 10, 2003, this court denied that motion for reconsideration. Again, plaintiff did not seek any review of that Order (# 208) by the district judge to whom this case is assigned consistent with the provisions of Rule 72(a), F.R. Civ. P. or Rule 2(a) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, and any attempt to do so now would be clearly untimely and improper. *See e.g.*, Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *see also*, *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466 (1985).

And, in any event, Dr. Souviron says nothing which casts any doubt whatsoever on the opinion of Dr. Levine. At best, Dr. Souviron avers that he [Souviron] is unable to form an opinion on the basis of that given to him by counsel for the plaintiff. That says nothing.

[80] Notwithstanding the fact that co-counsel for plaintiff previously used the expert services of Dr. Levine for his [then] client's benefit, lead counsel for the plaintiff off-handedly, and without citation to any meaningful authority, simply argued that bite mark evidence is but "junk science." That view, however, is not shared by any others who should know, so far as this court can determine. To the contrary, some thirty jurisdictions (and there may be more, but simply not reported), including the Commonwealth of Massachusetts, have concluded that, far from being the "junk science" that counsel now suggests, bite mark evidence is relevant, reliable, and admissible. *See e.g.*, *Commonwealth v. Cifizzari, 397 Mass. 560, 492 N.E.2d 357 (1986); State v. Blamer,* 2001 WL 109130 at *4 (Ohio App. 5 Dist., 2001); *Seivewright v. State,* 7 P.3d 24, 29-30 (Wyo.2000); *Brooks v. State,* 748 So.2d 736, 739 (Miss.1999); *People v. Marsh,* 177 Mich.App. 161, 441 N.W.2d 33, 36 (1989); *State v. Armstrong,* 179 W.Va. 435, 369 S.E.2d 870, 877 (1988); *State v. Stinson,* 134 Wis.2d 224, 397 N.W.2d 136, 140 (Ct . App.1986); *Spence v. State,* 795 S.W.2d 743, 750-52 (Tex.Crim.App.1990); *Sievewright v. State of Wyoming*, 7 P.3d 24 (2000); see also, *Brooks v. State of Mississippi*, 748 So.2d 736, 746-47 (1999)(referring to some twenty or more jurisdictions in which bite mark evidence is admissible).

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed `to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)(quoting Fed.R. Civ. P. 1).

To survive a motion for summary judgment, the opposing party must demonstrate that there is a genuine issue of material fact requiring a trial. Fed. R. Civ. P., 56(e); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As the Supreme Court recently has made clear, the standard for granting summary judgment "mirrors" the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). That is, the inquiry focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no `genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

A plaintiff may not obtain a trial merely on the allegations in its complaint, *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 289-290 (1968), or by showing that there is "some metaphysical doubt as to the material facts," Matsushita, supra, 475 U.S. at 586 (citations omitted). Where the non-moving party will bear the burden of proof at trial, Rule 56(c) mandates the entry of summary judgment against that party where it "fails to make a showing sufficient to establish the existence of an element essential to that party's case...." *Celotex Corp. v. Catrett*, 477 U.S. at 322. That is to say, to avoid summary

judgment, the opposing party "...must produce at least some evidence reasonably affording an inference supporting the existence of a triable issue of fact [with respect to the element which the opposing party must establish at trial]." *Santiago, et al. v. Group Brasil, Inc.*, 830 F.2d 413, 416 (1st Cir. 1987).[81]

III. Defendants Gerard Mattaliano and Lisa Buckley

At the hearing on defendants' motion for summary judgment, plaintiff conceded that he was unable to point to any material fact which indicated that either of these two defendants engaged in any conduct, or failed to engage in any conduct, which violated the civil rights of the plaintiff, or which amounted to an intentional tort under Massachusetts law. No such facts are set forth in his Statement of Material Disputed Facts (# 263). This court accordingly recommends that the court allow the motion for summary judgment to the extent that defendants Mattaliano and Buckley are named as defendants in the Third Amended Complaint.

IV. The Civil Substantive Rights Claims Sections 1983 and G.L. c. 12, § 11 I (Counts VII and XIII)

In Counts I and IV, plaintiff alleges that all of the state police defendants violated G.L. c. 12, § 11I and 42 U.S.C. § 1983, respectively, in that they caused plaintiff to be

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[81] As a consistent theme throughout this case, counsel for plaintiff simply allows that issues such as knowledge, intent, whether or not the parties engaged in a conspiracy, and the like, are but fodder for the jury. But that, of course, is totally inconsistent with *Santiago* and a host of First Circuit cases addressing the summary judgment standard. Only if plaintiff shows, at the summary judgment stage, that there is a triable issue of fact as to a material fact forming an element of an offense, that is, something more than mere conjecture, does the matter reach the jury, regardless of whether that element is one of knowledge, intent, or the like. *See e.g.*, *Local No. 48, United Broth. of Carpenters and Joiners of America v. United Broth. of Carpenters and Joiners of America*, 920 F.2d 1047, 1051 (1st Cir. 1990)("Even in cases involving so ineffable a matter as motive or intent, summary judgment may be warranted "if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Medina-Munoz*, 896 F.2d at 8; *see also Rossy v. Roche Products, Inc.*, 880 F.2d 621, 624 (1st Cir.1989); *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 109-10 (1st Cir.1988).")

arrested and detained in the absence of probable cause, and in that they caused plaintiff's premises to be searched without probable cause, all in violation of the Fourth Amendment and the Massachusetts Declaration of Rights.

Defendants herein move for summary judgment on the grounds that, on the basis of the undisputed material facts, plaintiff cannot make out a claim of an illegal arrest, an illegal detention, or an illegal search. Defendants herein also contend that they are immune from liability under the civil rights statutes.[82]

A. Defendant Kevin Shea

Apart from a claim that defendant Kevin Shea conspired to violate the civil rights of the plaintiff, a matter discussed separately below *vis a vis* Count III, plaintiff relies on but one fact in support of his claim that defendant Shea substantively violated the civil rights of the plaintiff, to wit: that defendant Shea participated in the arrest[83] of the plaintiff[84] -

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[82] Before addressing the matter of immunity, qualified or otherwise, this court must first determine whether any conduct on the part of Levine caused plaintiff to suffer a constitutional injury. *See e.g.*, *Abreu-Guzman v. Ford*, 241 F3d 69, (1st Cir. 2001). This court addresses those issues separately insofar as plaintiff brings civil rights claims against the remaining State Police defendants.

[83] Although plaintiff, in rather broadside and boilerplate pleadings, generally contends that the improper conduct of all of the defendants, Shea included, caused his arrest to be made without probable cause, his premises to be searched without probable cause, and his continued detention without probable cause, there is no evidence whatsoever, and plaintiff, at the hearing, suggested none, showing that Officer Shea participated in the search of plaintiff's house. And insofar as plaintiff contends - if he still does - that the conduct of Officer Shea caused plaintiff's continued detention, he has not shown how that could be the case, that is, how it could be said that the conduct of Officer Shea was a substantial cause of his continued detention. In point of fact, plaintiff's continued detention was based solely on the order of the district court judge. That order, in turn, was made after the district judge was made aware of the negative DNA report, and, then, only after the defendant, by and through counsel, chose not to seek bail. It cannot fairly be said by any stretch of the imagination that any conduct on the part of Officer Shea "caused" plaintiff's continued detention.

[84] In his Statement of Material Disputed Facts (# 263), plaintiff says nothing specific about the conduct of Officer Shea. At the hearing, counsel for plaintiff, upon inquiry from this court, simply said that Officer Shea was present at the time plaintiff was arrested. If that was the extent of Officer Shea's involvement in the arrest of plaintiff, it would hardly support a civil rights claim.

In order to make out a civil rights claim against defendant Shea, or any other defendant for that matter, plaintiff must, in order to prevail, show by a preponderance of the evidence that the conduct of defendant Shea

(continued...)

an arrest, plaintiff says, which was made without probable cause, all in violation of the Fourth Amendment and the Massachusetts Declaration of Rights.

As a major (and, indeed, only) premise to this claim, plaintiff says that there was no probable cause to arrest the plaintiff because Dr. Levine's expert opinion was flawed, and because DNA evidence had excluded the plaintiff.[85] On the first prong, however, plaintiff has made no showing whatsoever that the opinion of Dr. Levine was flawed in any respect.

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[84] (...continued)
"caused" his illegal arrest, his illegal detention, and the illegal search of his house. Causation within the meaning of Section 1983 must be read against basic tort law. Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 52 (1st Cir. 1997). Under traditional tort concepts, an action (or inaction, as the case may be) can be said to have caused an injury when it can be fairly said that that action (or inaction) was a substantial factor in producing the harm. E.g., Restatement (Second) of Torts § 433 (1965). In terms of a false arrest - to the extent that plaintiff's civil rights claim is based on an illegal arrest (*i.e.*, an arrest without probable cause) - a plaintiff must show that the defendant participated in that arrest. And participation surely means something more than merely being present. According to the Restatement (Second) of Torts § 45A (1965), "One who instigates or participates in the unlawful confinement of another is subject to liability to the other for false imprisonment." (Emphasis added). There is no suggestion - indeed, no allegation - that Officer Shea "instigated" the arrest. And, according to the Restatement, "participation" means something more than merely being present. It requires a showing that the defendant "aided and abetted" the alleged illegal arrest. As Section 45A, Comment (e) of the Restatement says: "**Participation**. One who takes part in a false imprisonment, by aiding another to make it, becomes liable as if he had acted by himself. (Emphasis added).

Accordingly, if the civil rights claim against Officer Shea was and is based on Officer Shea's mere presence, as counsel proffered at the hearing, then plaintiff would fall short of a false arrest claim, either as an independent state law claim for relief, or for a predicate to his civil rights claim against Officer Shea.

Nevertheless, this court, assuming that which was the obligation of counsel for plaintiff in the first place, has reviewed most of the submitted depositions in the entirety, even when no reference has been made to those depositions in the entirety, and, in that respect, perhaps by happenstance alone when reviewing the exhibits submitted by the State Police Officers in support of their motion for summary judgment, determined that, although Walpole Police Officer Dolan was the person who officially arrested the plaintiff, Officer Shea did call into plaintiff's house and tell plaintiff that they had a warrant for his arrest, and further that "[w]e took him out the front door and placed him in the cruiser and brought him down to the station." (# 259, Exhibit D - Deposition of Kevin Shea, pp. 137-139).

[85] We do not understand plaintiff to argue - and he certainly has not articulated anything to the contrary - that probable cause was wanting if Dr. Levine's expert opinion was accurate and reliable in all respects, and putting to one side the question of the DNA analyses. But if he is, this court finds and concludes that, as a matter of law, there was more than probable cause presented to the detached and neutral clerk magistrate who issued the arrest warrant, or known to the arresting officers at the time of the arrest if there was no arrest warrant. The report submitted to the clerk magistrate in connection with the issuance of the complaint and arrest warrant, and known to Walpole Police Officer Dolan who officially arrested the plaintiff, *see* pleading # 259, (Exhibit D - Deposition of Kevin Shea, pp. 137-139), is set forth in note 11, and clearly presents probable cause to believe that plaintiff murdered Irene Kennedy.

As indicated above, Dr. Levine, a diplomate of the ABFO - indeed, one of the founding fathers of the ABFO - opined to a reasonable degree of scientific certainty, based on the evidence presented to him, that the bite mark on Mrs. Kennedy's breast matched the dentition of the plaintiff. At the questioning of Dr. Levine at the deposition noticed by counsel for the plaintiff, Dr. Levine, in response to a question put to Dr. Levine by counsel for the plaintiff, reiterated that same view and testified that conclusion remains to be his conclusion. And for the reasons set forth above, Part I.11, and notes 18 through 19, plaintiff has not shown, and, indeed, cannot show, that the opinion was false or flawed. And as to the second prong, there is not a scintilla of evidence which even remotely suggests that the results of the DNA analyses was brought to the attention of Officer Dolan or any of the arresting officers before plaintiff's arrest. See note 16, *supra*.

Moreover, even if plaintiff could show that Dr. Levine's expert opinion was flawed, fatally or otherwise, Officer Shea, to the extent that he participated in the arrest pursuant to the lawfully issued warrant, or, indeed, pursuant to probable cause *sans* a warrant, is qualifiedly immune from suit. Under settled principles in this Circuit and elsewhere (*Iacobucci v. Bolter*, 193 F.3d 14, 21-22 (1st Cir. 1999)):

> Qualified immunity is a medium through which "the law strives to balance its desire to compensate those whose rights are infringed by state actors with an equally compelling desire to shield public servants from undue interference with the performance of their duties and from threats of liability which, though unfounded, may nevertheless be unbearably disruptive." *Buenrostro v. Collazo*, 973 F.2d 39, 42 (1st Cir.1992) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "Hence, state officials exercising discretionary authority are entitled to qualified immunity insofar as their conduct does not transgress clearly established constitutional or federal statutory rights of which a reasonably prudent official should have been aware." *Id.* To ascertain a defendant's

eligibility for such immunity, a court must inquire into the objective legal reasonableness of the defendant's actions, gauged in connection with the mosaic of legal rules that were clearly established when the defendant acted. *See Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In operation, the outcome of this inquiry "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.*

Iacobucci asserts that Boulter, a policeman acting under color of his official authority, lacked probable cause to arrest him and thereby violated his Fourth Amendment rights. In this wise, he observes that a citizen's right to be free from arrest in the absence of probable cause has long been clearly established. *See*, *e.g.*, *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). That observation sweeps so broadly, however, that it bears very little relationship to the objective legal reasonableness *vel non* of Boulter's harm-inducing conduct. *See Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1699-1700, 143 L.Ed.2d 818 (1999). The "right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034. Our inquiry, then, reduces to whether a reasonable police officer, standing in Boulter's shoes, would have known that arresting Iacobucci for disorderly conduct, under all the attendant circumstances, would contravene clearly established law. That inquiry must proceed in light of the commonly held understanding that probable cause exists only if the facts and circumstances within the arresting officer's knowledge "are sufficient to lead an ordinarily prudent officer to conclude that an offense has been, is being, or is about to be committed, and that the putative arrestee is involved in the crime's commission." *Logue v. Dore*, 103 F.3d 1040, 1044 (1st Cir.1997).

In this case, given all that was presented to the issuing magistrate, including the expert opinion of Dr. Levine about which none of the officers had reason to gainsay,[86] there was clearly more than probable cause to believe that plaintiff murdered Irene Kennedy.[87]

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[86] Including Town of Walpole police officer Dolan who presented his report in support of the issuance of a criminal complaint and an arrest warrant, and Officer Shea, who was privy to the information within that report.

[87] We do not view it insignificant that counsel for the plaintiff in the underlying criminal case, and co-counsel here, never suggested that there was not probable cause to arrest the plaintiff - even after counsel was advised about the exculpatory DNA results. To the contrary, counsel at that time chose not to seek plaintiff's release, although he clearly could have done so.

(continued...)

Translating the *Iacobucci v. Bolter* holding and rationale to the conduct of Officer Shea, there is no precedent, much less clearly established precedent, suggesting that a law enforcement officer who makes an arrest (with or without a warrant) based on sufficient probable cause but which includes expert opinions that, within the crucible of trial, are shown to be doubtful, violates the arrested person's civil rights. Indeed, if that were the case, no law enforcement officer worth his or her salt, and in his or her right mind, would effect an arrest where the probable cause included expert conclusions, since, as even the casual observer of current jurisprudence clearly shows, anyone can, these days, always find an expert to gainsay this or that. Liability *vel non*, and particularly civil rights liability, should not turn on the current state of the battle of the experts.

Accordingly, plaintiff has not shown, and cannot show, that the conduct of Officer Shea, caused a violation of the plaintiff's civil rights. And even if he could, Officer Shea would be protected from suit by qualified immunity. Summary judgment should enter in favor of Officer Shea and against plaintiff to the extent that plaintiff contends that the conduct of Office Shea violated his civil rights as alleged in Counts I and IV.

B. Defendant Scott Jennings

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[87] (...continued)

Throughout his response to the current motion, as well as in his responses to other similar motions, plaintiff, referring to *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999), says, *e.g.*, # 262, p. 7, without any specific page reference (and, not surprisingly so), "[t]he question of the existence of probable cause is for the jury to determine." That, however, is only half correct and, in context misleading. It is for the jury to determine the underlying facts. But it is for the court, and for the court alone, to determine whether the underlying facts (as found by the jury, or, as here, the undisputed material facts) provide probable cause. *E.g.*, *Martin v. Applied Cellular Technoloogy, Inc.*, 284 F.3d 1, 7 (1st Cir. 2002).

At the hearing before this court, plaintiff, by and through counsel, contended that Officer Jennings violated his civil rights on account of the fact that he executed the affidavit in support of a search warrant for plaintiff's premises on December 10, 1998.[88]

For exactly the same reasons set forth above with respect to Officer Shea, plaintiff has not shown by any facts - and, indeed, cannot show by any facts - that Officer Jennings violated the civil rights of the plaintiff. There is not a single fact, indeed, not even an exciting suspicion, that Officer Jennings had any reason to believe whatsoever that Dr. Levine was incorrect in his opinion that the bite mark on Mrs. Kennedy's breast matched plaintiff's dentition.[89] Nor is there an iota of evidence showing, or even tending to show, that Officer Jennings was aware of the negative DNA report before he executed the affidavit in support of the application for the search warrant.[90] The only evidence on this score is to the contrary, to wit: Officer Jennings first became aware of the negative DNA report on December 11, 1998, the day after he executed that search warrant affidavit, when he was at the courthouse in connection with the arraignment of the plaintiff, *e.g.*, Pleading No. 259 -

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[88] Plaintiff does not contend that Officer Jennings participated in his arrest. In Plaintiff's Statement of Material Disputed Facts (# 263), plaintiff says nothing further on this score. His sole argument on this score focuses on the search warrant affidavit.

In the event, however, that plaintiff changes horses midstream (and he has, to some extent, presented a moving target over the past several years) and raises the specter of his arrest *vis a vis* the liability of Officer Jennings, this court observes (although not brought forward by counsel for the plaintiff in any respect) that Officer Jennings was present at the time plaintiff arrested. He testified that [he] was more of a spectator than actually getting involved in the arrest of [plaintiff]."

For the reasons noted above in the discussion concerning the liability of Officer Shea, note 23, *supra*, plaintiff, even if he should advance new theories at this late date, cannot realistically show that Officer Jennings' mere presence as a spectator violated plaintiff's civil rights in any respect.

[89] At his deposition taken by counsel for plaintiff, Officer Jennings testified that "My understanding was that Dr. Levine is the expert in the field....". (# 259, Exhibit F - Deposition of Scott Jennings, pp. 47-48).

[90] At his deposition, Officer Jennings testified that he had no idea as to the status of the DNA investigation (# 259, Exhibit F - Deposition of Scott Jennings, p. 68).

Exhibit D - Deposition of Scott Jennings, p. 68, and plaintiff has proffered nothing to the contrary.

Moreover, even if plaintiff could show that Dr. Levine's expert opinion was flawed, fatally or otherwise, Officer Jennings, to the extent that he executed an affidavit in support of an application for a search warrant which incorporated that opinion, has clearly shown his entitlement to qualified immunity from suit for the reasons set forth above, pp. 15-17, with respect to Officer Shea. Defendant Scott Jennings is entitled to summary judgment on plaintiff's substantive civil rights claims (Counts I and IV) brought against him.

C. Defendant Steven McDonald

Insofar as plaintiff's civil rights' claims relate to his alleged arrest without probable cause, in his Opposition (# 262) to defendants' motion for summary judgment, plaintiff articulates no meaningful theory of liability *vis a vis* Trooper McDonald other than to say (Opposition # 262, p. 8):

> However, even if it can be said that a warrant existed here, the plaintiff should overcome summary judgment because the Massachusetts State Police (together with the other defendants) presented shoddy goods to the court.[91] The conduct of Troopers McDonald, Jennings and Shea is particularly applicable.[92] (Emphasis added).

At the hearing on the motion for summary judgment, counsel for plaintiff, for the first time, suggested, without any articulation, and without reference to any authority, that the

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91 Of course, Trooper McDonald presented nothing to the court, "shoddy" or otherwise.

92 Whatever that means. The argument does not even come close to being helpful in discerning plaintiff's theory for recovery.

failure of Trooper McDonald to forthwith disclose[93] the negative DNA analysis[94] violated his due process rights as defined by *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Beyond this hornbook incantation of some "constitutional duty to disclose exculpatory evidence", plaintiff said nothing further.

In that suggestion, however, plaintiff, at once, says too much and too little. Too little because he fails to apply the *Brady* rationale to the facts of this case. And too much because he overstates the holding of *Brady* and its progeny.

Brady and its progeny do not hold that the failure to disclose exculpatory evidence *qua* failure to disclose exculpatory evidence is, in and of itself, a violation of one's constitutional rights. *Brady*, and its most notable kissing cousins, *Giglio v. United States*, 405 U.S. 150 (1972), and *United States v. Agurs*, 427 U.S. 97 (1976), holds, at most, that the failure of the prosecutor to disclose exculpatory evidence to the defense at trial

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[93] Of course, plaintiff's inconsistency on this score looms large. On the one hand, in order to reach into the pocket of Trooper McDonald, plaintiff contends that McDonald did not timely disclose that information to Officer Dolan (who applied for the arrest warrant) and Trooper Shea (who applied for the search warrant). On the other hand, in order to reach into the pockets of Officers Dolan and Shea, plaintiff, quite inconsistently, contends (Opposition, p. 8) that Trooper McDonald passed this information along to Officers Dolan and Shea ("McDonald knew of the DNA exoneration before the arrest...Jennings and Shea must surely also have known. All participated in the decision to withhold this information from the Magistrate.").

[94] Counsel for plaintiff consistently contends that the DNA analysis completed by the Maine State Laboratory conclusively ruled out the plaintiff, or, in his words, completely "exonerated" the plaintiff. For purposes of this motion for summary judgment, we assume as much. But it should be added that, on this, plaintiff stands alone. The forensic examiner (Callichio) in the Maine State Laboratory apparently did not think so, since she welcomed Trooper McDonald's suggestion that additional swabbings be forwarded for analysis. The Assistant District Attorney did not think that to be the case. The arraignment judge, who was fully apprised of that which was reported by the Maine State Laboratory, obviously did not think so, since he ordered plaintiff held without bail, that report notwithstanding. And counsel for plaintiff in the underlying criminal case (and co-counsel in this civil case) obviously did not think so, since he chose not to move for plaintiff's release on bail notwithstanding that report. It was only after a further DNA test was conducted by a laboratory in the private sector that the District Attorney moved to *non pros* the case.

amounts to a denial of a fair trial in violation of the due process clause.[95] The plaintiff was never tried in this case. He was never denied a fair trial in this case. *Brady* and that which follows *Brady*, is, quite simply, not applicable.

Looking at the precise issue before this court, and not hornbook generalities not tailored to the facts of this case, this court is not satisfied that a delayed disclosure - as is the case here[96] - by one of many investigators assigned to a murder investigation implicates substantive due process considerations under the Fourteenth Amendment. *Brady* and its progeny, bottomed on a defendant's due process right to a fair trial, requires the prosecutor to disclose exculpatory evidence to the defense. It does not require investigators to disclose exculpatory evidence to the defense or a defendant. At best, it requires investigators to disclose - at some point - exculpatory evidence to the prosecutor. *E.g.*,

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[95] Or more broadly stated by Justice Souter in his concurring opinion in *Albright v. Oliver*, 510 U.S. 266, 273 n. 6 (1994):

> Justice Stevens' dissent faults us for ignoring, inter alia, our decision in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Winship undoubtedly rejected the notion that all of the required incidents of a fundamentally fair trial were to be found in the provisions of the Bill of Rights, but it did so as a matter of procedural due process: " 'This notion [that the government must prove the elements of a criminal case beyond a reasonable doubt]--basic in our law and rightly one of the boasts of a free society--is a requirement and a safeguard of due process of law in the historic, procedural content of "due process." ' " *Id.*, at 362, 90 S.Ct., at 1071, quoting *Leland v. Oregon*, 343 U.S. 790, 802-803, 72 S.Ct. 1002, 1009-1010, 96 L.Ed. 1302 (1952) (Frankfurter, J., dissenting).
>
> Similarly, other cases relied on by the dissent, including *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), were accurately described in the latter opinion as "dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution." *Id.*, at 107, 96 S.Ct., at 2399. (Emphasis added).

[96] Although plaintiff speaks in terms of failure to disclose exculpatory evidence, there is no question but that, at the very best case for plaintiff, Trooper McDonald did disclose the negative DNA report to Officer Shea and the Assistant District Attorney (and, perhaps, others as well) on the morning of December 11, 1998, less than 24 hours after he (again, according to the evidence most favorable to the plaintiff) received it in the form of an oral report on December 10, at approximately 11:00 a.m.

Campbell v. State of Maine, 632 F.Supp. 111, 121 (D.Me. 1985);[97] *see also*, *Reid v. State of N.H.*, 56 F.3d 332(1st Cir. 1995)(referring to the duty of investigators to disclose exculpatory evidence to the prosecutors). But this court is unaware of any case which holds that an investigator's failure to disclose exculpatory evidence, intentional or otherwise, violates one's constitutional rights where there has been no trial - no adjudication of guilt or innocence.[98] Along those lines (the necessity of a trial and a trial's concomitant fair trial rights to raise the *Brady* issue), it has been held, for example, that a prosecutor's failure, intentional or otherwise, to disclose exculpatory evidence to a grand jury which returns an indictment does not state a constitutional claim. *United States v. Williams*, 504 U.S. 36 (1992).[99] This court is unaware of any authority - and plaintiff has offered precious little in that respect[100] - holding that the failure of one of many investigators

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[97] There that Court observed (*Id.*):

> Thus, although the duty to disclose exculpatory information falls "on the state, as a whole," *Hauptman v. Wilentz*, 570 F.Supp. 351 (D.N.J.1983), there is no independent duty of a police officer or investigative officer to disclose exculpatory information to a defendant. Id. at 351 n. 43. Therefore, the failure to reveal such information to the plaintiff in this case does not amount to a constitutional violation. *Id.* The only duty of a police officer in possession of exculpatory information is to turn it over to the prosecutor. (Emphasis added).

[98] In *Reid* and *Campbell*, referred to immediately above, there was a trial at which the plaintiffs in those cases were convicted.

[99] In a very practical sense, that is the functional equivalent of arresting a person notwithstanding the knowledge of undisclosed exculpatory evidence. And that is because under Rule 9(a), F.R. Crim. P., the court, *via* the Clerk, is required to issue an arrest warrant at the request of the prosecutor.

[100] In connection with the current motion, plaintiff appended to his opposition (# 225) an apparently unreported and unpublished opinion in a district court case, *Gregory v. City of Louisville*, Civil Action No. 01-535-R, Memorandum and Order (W.D. Ky. February 18, 2002). And on an earlier occasion, in connection with an earlier filed motion, he tendered the case, *Keko v. Hinkle*, 318 F.3d 639 (5th Cir. 2003). Both cases miss the mark, however, for two reasons. First and foremost, in both those cases, the plaintiffs, as defendants in an earlier criminal case, had been tried and convicted. And, of course, here there was no trial - hence, no due process implications. Secondly, and equally as important, in both the cases relied upon by the plaintiff, the defendant was an "information provider" or the defendant "fabricated" false evidence which was used at trial. That is to say, it was not just a matter of withholding exculpatory evidence, but affirmatively supplying the prosecution a half a loaf, inculpatory evidence but intentionally excluding the exculpatory evidence, for the purpose of some affirmative

(continued...)

jointly investigating a crime to disclose exculpatory evidence to the prosecutor (or fellow investigators) in a case which never goes to trial states a claim under Section 1983 based on notions of due process of law, notwithstanding the fact that the person was arrested on information which did not include that exculpatory evidence. Indeed, what Circuit law that does exist suggests to the contrary. Thus, in *Jean v. Collins*, 221 F.3d 656 (4th cir. 2000), *cert. denied*, 531 U.S. 1076 (2001), the concurring members of the *en banc* Court observed (*Id.* at 663):

> A *Brady* violation that resulted in overturning of § 1983 plaintiff's conviction is a necessary, but not a sufficient, condition for § 1983 liability on the part of the police. It is a necessary condition because the *Brady* violation establishes the requisite threshold of constitutional injury (a conviction resulting in loss of liberty) below which no § 1983 action can lie. It is not a sufficient condition, however, because the *Brady* duty is a no fault duty and the concept of constitutional deprivation articulated in both *Daniels* [474 U.S. 327, 106 S.Ct. 662 (1986)] and *Youngblood* [488 U.S. 51, 109 S.Ct. 333 (1988)] requires that the officer had intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial. This is what is meant by "bad faith." (Emphasis added).

And, given the stated reluctance to expand notions of due process (substantive or procedural) beyond that already carved out, *see Albright v. Oliver*, 510 U.S. 266 (1994); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992),[101] this court concludes that the failure of Trooper McDonald to notify the prosecutors

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[100] (...continued)
prosecutorial step (in *Keko*, the submission of a forensic report which included the inculpatory evidence but excluded the exculpatory evidence at an ex parte probable cause hearing), or purposefully fabricating evidence which was used at trial (in *Gregory*, there was an allegation that a forensic expert "fabricated falsely inculpatory evidence"). That is clearly not the case here. Plaintiff has not alleged - much less shown - that Trooper McDonald was an "information provider" - *i.e.*, that he applied for an arrest warrant or search warrant while excluding exculpatory evidence. And plaintiff quite obviously cannot make that showing at trial. Nor does plaintiff allege - much less show - that Trooper McDonald "fabricated" any evidence.

[101] There the Court observed (*Id.* at):

(continued...)

of the negative DNA results in the circumstances of this case - circumstances which include the fact that the defendant was never tried on the charge - does not provide plaintiff with a cause of action under Section 1983 or G.L. c. 12, § 11 I.

Moreover, even if some court should eventually conclude to the contrary, that is, that such failure gives rise to a cause of action under Section 1983 and G.L. c. 12, §11I, this court finds and concludes that traditional concepts of qualified immunity shield Trooper McDonald from suit in this case. In a somewhat analogous case, the United States Court of Appeals for this Circuit observed *vis a vis* the nature and scope of qualified immunity (*Brady v. Dill*, 187 F.3d 104, 115-1166 (1st Cir. 1999)):

> To determine a defendant's eligibility for qualified immunity, courts must define the right asserted by the plaintiff at an appropriate level of generality and ask whether, so characterized, that right was clearly established when the harm-inducing conduct allegedly took place. *See Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). This does not mean that a right is clearly established only if there is precedent of considerable factual similarity. *See id.* at 640, 107 S.Ct. 3034 (explaining that a general rule of constitutional law identified by precedent may clearly apply to the specific conduct at issue, even though "the very action in question has [not] previously been held unlawful"). It does mean, however, that the law must have defined the right in a quite specific manner, and that the announcement of the rule establishing the right must have been unambiguous and widespread, such that the unlawfulness of particular conduct will be apparent ex ante to reasonable public officials. *See Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1699-1701, 143 L.Ed.2d 818 (1999); *Ringuette v. City of Fall River*, 146 F.3d 1, 4 (1st Cir.1998);

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[101] (...continued)

Petitioner's constitutional claim rests entirely on the Due Process Clause of the Fourteenth Amendment. The most familiar office of that Clause is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State. Petitioner, however, does not advance a procedural due process claim in this case. Instead, she relies on the substantive component of the Clause that protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them...As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. (Emphasis added).

> *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 704 (1st Cir.1993). After all, qualified immunity for public officials serves important societal purposes, and it is therefore meant to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). (Emphasis added).

For the reasons set forth above - *i.e.*, that no court has ever concluded in the context of a case which never proceeded to trial that a failure to disclose exculpatory evidence, standing alone, subjects the actor to liability under Section 1983 - this court cannot fairly conclude that any reasonable police officer should have known that such conduct (or such inaction) would violate one's civil rights and subject that police officer to suit under Section 1983 or G.L. c. 12, §11I. More particularly, to fit the material undisputed facts of this case, no reasonable police officer would have or should have known that a delayed disclosure of no more than twenty-four hours, perhaps less, would expose that police officer to liability under Section 1983.[102] For these reasons, Trooper McDonald is entitled to summary

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[102] In *Brady v. Dill*, *supra*, the Court did not rule out the possibility that, under some circumstances, otherwise not delimited, a police officer might have to bring exculpatory evidence to the attention of a prosecutor or a judicial officer after an erroneous arrest. Presumably, although it is by no means explicit, that Court was intimating that under some extraordinary circumstances, the failure to disclose such exculpatory evidence might give rise to a cause of action under § 1983. But, in that case, the plaintiff was detained some thirty-six (36) hours, and the court concluded that that fell short of making an actionable claim. In this case, the plaintiff was in custody for less than twenty-four hours by all accounts before the exculpatory evidence was, concededly, brought to the attention of the prosecutor and arraignment judge alike. Moreover, to the extent that plaintiff might believe that he finds solace from the observations in *Brady v. Dill*, and he certainly has not suggested that to date, since plaintiff never put it on the table, that case was decided in July of 1999, some seven months after the events in this case.

Moreover, even as of 2001, some two years after the events in issue here, the contours of the duties of an investigator who learns of exculpatory evidence are less than clearly defined. As recently observed by Judge McAuliffe, in referring to the opinion of the rather fractured *en banc* opinion of the Fourth Circuit in *Jean v. Collins*, 221 F.3d 656 (4th cir. 2000), *cert. denied*, 531 U.S. 1076 (2001) (*Reid v. Simmons*, 163 F.Supp.2d 8, 87 n. 2 (D.N.H. 2001)):

> Following the lead of dissenting Judge Murnaghan, the court has referred to the second en banc opinion in *Collins* as the "concurrence," because, eventually, the judgment of the district court was affirmed by an evenly divided court of appeals. The procedural history of that case is lengthy: the district court granted the police officers' motion for summary judgment, based on qualified immunity. A court of appeals panel initially reversed and remanded, *Collins*, 107 F.3d 1111 (4th Cir.1997), but on rehearing, the court, sitting en banc, affirmed the district court. *Collins*, 155 F.3d 701 (4th Cir.1998). The Supreme Court then granted certiorari, vacated the en

(continued...)

judgment *vis a vis* the substantive civil rights claims (Counts I and IV) to the extent that those claims are based on his arrest on December 10, 1998.[103]

To the extent that plaintiff advances the same claim on account of the search of his premises - *i.e.*, Trooper McDonald failed to impart the negative DNA analysis to Trooper Jennings who, in turn, applied for the search warrant, it is even more clear that, on the basis of the undisputed evidence, plaintiff is entitled to no relief.

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[102] (...continued)
banc court's decision, and remanded the case for further consideration. *Collins*, 526 U.S. 1142, 119 S.Ct. 2016, 143 L.Ed.2d 1029 (1999). On remand, an equally divided en banc court held that plaintiff failed to establish that his constitutionally protected rights had been violated. *Collins*, 221 F.3d 656 (4th Cir.2000). The Supreme Court denied further review. *Collins*, 531 U.S. 1076, 121 S.Ct. 771, 148 L.Ed.2d 671 (2001). The history of *Collins* reveals the scope of the legal debate relating to police officer liability for *Brady* violations. It also tends to undermine any assertion that the precise contours of a criminal defendant's constitutionally protected rights in this area are, even today, "clearly established." (Emphasis added).

Later, in that same case, Judge McAuliffe observed (*Id.* at 95):

> If, however, one poses the question at a level of generality more appropriate to this case, the answer is not so self-evident. For example, if the relevant inquiry is defined as whether, in 1987, it was clearly established that police officers had a constitutionally mandated obligation to turn over reports or other evidence that is not, on its face, patently "exculpatory," but which, in the right defense counsel's hands, might nevertheless prove effective for impeachment purposes, one would be hard-pressed to answer in the affirmative. That is particularly true since only recently have courts begun to conclude that police officers might bear some liability under § 1983 for withholding material evidence that leads to a *Brady* violation. *See, e.g.*, *Brady v. Dill*, 187 F.3d 104, 114 (1st Cir.1999) ("a police officer sometimes may be liable if he fails to apprise the prosecutor or a judicial officer of known exculpatory information.") (citing cases from other circuits) (emphasis supplied). *See also Jean v. Collins*, 221 F.3d at 659 ("The Supreme Court decisions establishing the *Brady* duty on the part of prosecutors do not address whether a police officer independently violates the Constitution by withholding from the prosecutor evidence acquired during the course of an investigation. Recent cases, including some from this circuit, have pointed toward such a duty.... These cases have left unclear the exact nature of any duty that the law imposes on police with regard to exculpatory evidence.") (citations omitted). In other words, the notion that police officers can be personally civilly liable for conduct giving rise to *Brady* violations is a relatively recent development in the law and, even today, its character and contours remain somewhat ill-defined, particularly in this circuit. (Emphasis added).

[103] Plaintiff does not, and, indeed, cannot responsibly, contend that the alleged inaction on the part of Trooper McDonald caused his continued detention. After all, the undisputed material evidence shows that that information was imparted to Trooper Shea and the prosecutor in the morning of the very next day, that is, the day of arraignment, and that that information was imparted to the judge and defense counsel as well. Although plaintiff was detained thereafter, it cannot be said that he was detained on account of any inaction - much less unconstitutional inaction - on the part of Trooper McDonald.

In terms of whether a constitutional tort has been committed, plaintiff has proffered no authority whatsoever. This court's review of the relevant authorities, however, shows that, because the consequences of a search are less draconian than a judgment of conviction, the failure to include exculpatory evidence in a search warrant affidavit does not give rise to liability under Section 1983 or G.L. c. 12, §11I. *See e.g.*, *Mays v. City of Dayton*, 134 F.3d 809, 815-816 (6th Cir. 1998). In *Mays*, the court concluded (*Id.*):

> As an alternative basis for denying summary judgment, the district court held that a genuine issue of material fact existed as to whether the affidavit failed to include potentially exculpatory information in violation of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The district court found that Detective Gabringer's omission of the fact that he had attempted unsuccessfully to get Dr. Mays to write a prescription for him and his wife raised the potential of a *Franks* violation. It also held that whether or not the warrant without the omitted fact showed probable cause was a question of material fact, preempting the granting of summary judgment.
>
> In *Franks*, the Court held that a party may only challenge the veracity of an affidavit if that party can make a "substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and that the allegedly false statement was necessary for a finding of probable cause. *Id.* at 155, 156, 98 S.Ct. at 2675, 2676-77. The inquiry does not continue if the court finds that the exclusion of the allegedly false statement does not result in a lack of probable cause. If the party succeeds in meeting this burden, the party is entitled to a hearing to determine if a preponderance of the evidence supports the allegations of lack of veracity. *Id.* While this case does not involve any allegedly false statements, we have previously held that the *Franks* doctrine applies to omissions of information from affidavits as well. *United States v. Bonds*, 12 F.3d 540, 568-69 (6th Cir.1993).
>
> A *Franks* hearing may be merited when facts have been omitted in a warrant application, but only in rare instances. This Court recently held in *U.S. v. Atkin*, that affidavits with potentially material omissions, while not immune from *Franks* inquiry, are much less likely to merit a *Franks* hearing than are affidavits including allegedly false statements. *U.S. v. Atkin*, 107 F.3d 1213, 1217 (6th Cir.1997). This court reasoned that allowing omissions

to be challenged would create a situation where almost every affidavit of an officer would be questioned. *Id.*

Rather than apply a *Franks* analysis, the district court, apparently misconstruing the meaning of *Franks*, imputed the rationale of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), into the warrant application process. This is clear error as the warrant process differs significantly from the trial process.

Affidavits in support of search warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965). An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation. *United States v. Colkley*, 899 F.2d 297, 302 (4th Cir.1990). Clearly an affidavit should not be judged on formalities, as long as probable cause is evident.
The district court's inference that the due process protection provided to defendants prior to trial under *Brady* applies to the warrant process under the guise of a *Franks* analysis, thereby entitling the subject of a search warrant to disclosure of any information potentially contradicting a finding of probable cause, particularly concerns this Court. *Brady* and its progeny established the prosecutor's duty to disclose to the defendant exculpatory evidence, defined as material evidence that would have a bearing upon the guilt or innocence of the defendant. *Brady v. Maryland*, 373 U.S. 83,87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, 112-13, 96 S.Ct. 2392, 2401-02, 49 L.Ed.2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985). This rule, derived from due process, helps to ensure fair criminal trials, protecting the presumption of innocence for the accused, while forcing the state to present proof beyond a reasonable doubt. *Bagley*, 473 U.S. at 675, 105 S.Ct. at 3380; *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97.

By contrast, the probable cause determination in *Franks*, derived from the Fourth Amendment, involves no definitive adjudication of innocence or guilt and has no due process implications. Because the consequences of arrest or search are less severe and easier to remedy than the consequences of an adverse criminal verdict, a duty to disclose potentially exculpatory information appropriate in the setting of a trial to protect the due process rights of the accused is less compelling in the context of an application for a warrant.

The duties imposed by *Brady* and *Franks* differ further. In the *Brady* context, the constitutional obligation to disclose material exculpatory

> information attaches regardless of the prosecutor's intent and constitutional error can be found without a demonstration of moral culpability. *Agurs*, 427 U.S. at 110, 96 S.Ct. at 2400-01. A *Franks* violation, however, does require a showing of intent, i.e., a "deliberate falsehood" or "reckless disregard for the truth." *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684.
>
> Whereas the "overriding concern" of *Brady* is with the "justice of finding guilt" that is appropriate at trial, Agurs, 427 U.S. at 112, 96 S.Ct. at 2401 , *Franks* recognizes that information an affiant reports may not ultimately be accurate, and is willing to tolerate such a result at that early stage of the process, so long as the affiant believed the accuracy of the statement at the time it was made. *Franks*, 438 U.S. at 165, 98 S.Ct. at 2681.
>
> These disparate standards of intent reflect differences in the consequences of error in the two contexts. They also indicate recognition that the non- lawyers who normally secure warrants in the heat of a criminal investigation should not be burdened with the same duty to assess and disclose information as a prosecutor who possesses a mature knowledge of the entire case and is not subject to the time pressures inherent in the warrant process. A statement of these differences does not condone deliberate misrepresentations in the warrant application process. Rather it points out that the obligations shouldered during the adjudication process should not be imposed by inference onto the warrant application process.
>
> To interweave the *Brady* due process rationale into warrant application proceedings and to require that all potentially exculpatory evidence be included in an affidavit, places an extraordinary burden on law enforcement officers, compelling them to follow up and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded. Under such a scenario, every search would result in a swearing contest with participants arguing after the fact over whether exculpatory evidence even existed.

The holding in *Mays* is clear and unequivocal, and this court is unaware of any contrary authority. Indeed, the rationale of *Mays* is even more compelling in this case. In *Mays*, the Section 1983 action was brought against the police officer who executed the search warrant affidavit and application. In this case, the search warrant affidavit and application was <u>not</u> executed by Trooper McDonald; to the contrary, it was executed by

Trooper Jennings - a State Police officer who plaintiff says [104] was totally unaware of the alleged exculpatory evidence.

Moreover, even if some court should hold (or has already held, but not brought to the attention of this court - and certainly not by counsel for the plaintiff) that the failure of one of many investigating officers to disclose exculpatory information to another law enforcement officer who is about to apply for a search warrant is a constitutional tort, the remedy for which lies in Section 1983, Trooper McDonald is still entitled to qualified immunity. And that is precisely for the same reason set forth above - that is, no reasonable officer could have or should have known that such inaction was unconstitutional. Trooper McDonald is accordingly entitled to summary judgment on the substantive civil rights claims (Counts I and IV)

V. The Civil Conspiracy Claim (Count III)

In the two consolidated actions (Civil Action No. 00-10376-GAO and Civil Action No. 00–10384-GAO), plaintiff alleges in the most conclusory of terms that all of the various and sundry defendants, the whole kit and kaboodle, conspired to deprive plaintiff of his civil rights.

In addressing that contention in the context of a motion to dismiss which, by its terms, looks solely to the well-pleaded allegations, this court said, in the Report and Recommendation entered on May 15, 2003:

> Notwithstanding that said immediately above *vis a vis* plaintiff's substantive claims against Crowley under Section 1983 (Count 2) and the Massachusetts Civil Rights Act (G.L. c. 12, § 11 I)(Count 4), plaintiff has not

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[104] For the purpose of imposing liability on Trooper McDonald.

fairly pleaded a conspiracy to violate plaintiff's civil rights under Section 1983 as alleged in Count 3 and the remainder of the allegations of the Third Amended Complaint.

It goes without saying that, in order to establish a conspiracy, plaintiff must allege sufficient facts that the defendant Crowley agreed with others, tacitly or otherwise, to violate plaintiff's civil rights. Vague and conclusory allegations of the existence of a conspiracy are not enough to sustain a plaintiff's burden - a complaint must contain factual allegations suggesting that the defendants reached a meeting of the minds. See e.g., Amundsen v. Chicago Park Dist., 218 F.3d 712, 718 (7th Cir.2000); Francis-Sobel v. Univ. of Maine, 597 F.2d 15, 17 (1st Cir.1979); Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir.1980) (affirming dismissal because complaint "neither elaborates nor substantiates its bald claims that certain defendants 'conspired' with one another"). That is to say, merely asserting the existence of a conspiracy by pleading the conclusory word, "conspiracy', does not make the day. E.g., Hanania v. Loren-Maltese, 212 F.3d 353, 356 (7th Cir.2000).

In this case, that is all that plaintiff has alleged. In Count 3, plaintiff simply alleged:

> 81. By having engaged in the conduct described above, the Defendants conspired to deprive Mr. Burke of the equal protection of the law or of the equal privileges and immunities under the law, and they acted in furtherance of the conspiracy, which resulted in the injury to Mr. Burke described above, in violation of 42 U.S.C. § 1983. (Emphasis added).

That conclusory allegation, however, stands alone. There is not a single, solitary allegation of a fact in the 26 pages, more or less, of the Third Amended Complaint which even touches upon any meeting of the minds, tacitly or otherwise, between defendant Crowley and any other person. To the contrary, the entire thrust of the case against Crowley is that she, on her own, in order to advance her career, fabricated a forensic opinion. There is nothing alleged whatsoever that she shared her alleged scheme with any other defendant or person. Indeed, plaintiff specifically alleges (Third Amended Complaint, ¶ 57), contrary to any notion that defendant Crowley shared a common design or scheme with the other defendants, most of whom are state police officers, that she "lied" to the state police as well. Plaintiff's use of the magic talisman, "conspired", in Count 3, against a backdrop of an allegation that it was the "Defendants" (without any specificity as to which defendants, if any) who so conspired, fails to meet the requirements of established law in this Circuit, Francis-Sobel, supra, and Slotnick, supra, that

a bare minimum of facts must be pleaded in support of a conspiracy claim. (Footnotes omitted).

Plaintiff fared no better when the issue was addressed within the context of a motion for summary judgment, which permitted a peek at the material facts. In rejecting a conclusion that Dr. Levine conspired with all of the defendants to deprive plaintiff of his civil rights, this court observed:

> In Count VI, plaintiff generally alleges that all defendants named in that complaint conspired to deprive the plaintiff of his civil rights.
>
> In connection with an earlier motion to dismiss filed by defendants Crowley, Kessler and Evans, in Civil Action No. 00-10376-GAO, (Report and Recommendation (# 231, pp. 17-19)), this court observed:
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> * * * * *
>
> What we said there applies in spades within the context of a motion for summary judgment. That is to say, when a plaintiff claims that defendants conspired to violate his civil rights, he must proffer specific facts tending to show that a conspiracy existed to survive a summary judgment motion; conclusory allegations will not suffice. *E.g.*, *Easter House v. Felder*, 852 F.2d 901, 919 (7th Cir.1988). To be sure, since a conspiracy is rarely proven by direct evidence, a plaintiff may satisfy that burden with circumstantial evidence. But aside from a boilerplate suggestion by counsel at the hearing suggesting that the "totality of the circumstances" shows the existence of a conspiracy, plaintiff has not ferreted out one single fact from which it could be reasonably inferred that Dr. Levine conspired and agreed with others to violate plaintiff's civil rights. All that he is shown is that Dr. Levine rendered an expert opinion, and indeed, on the current state of the record, an unassailed and unassailable expert opinion - and nothing more. That is hardly the sort of circumstantial evidence that precludes brevis disposition, and defendant Levine is clearly entitled to judgment as a matter of law on Count VI.

What has been written and determined before with respect to the defendants Crowley, Kessler, Evans, and Levine, apply equally to the defendant State Police Officers. After close to five years after the events in issue, and some four years after having filed his

complaints in this case, plaintiff can muster no more than that all of the State Police officers (as well as the Town of Walpole police officers) were joined in a unitary investigation - and nothing more. To that, this court would add, no doubt, that each of the investigating officers conducted themselves with a single purpose - to bring the murderer of Irene Kennedy to book. But that is far, far, short of showing a conspiracy to violate the civil rights of the plaintiff. The State Police Officers, and all of them, are entitled to summary judgment on Count III.[105]

VI. The Pendent State Law Claims

In his opposition (# 262) to the motion for summary judgment filed by the defendant State Police Officers, plaintiff says absolutely nothing *vis a vis* the pendent state law claims asserted against these defendants other than to say (Opposition # 262, p. 15) that he incorporates his arguments previously made in connection with the motion to dismiss filed by defendants Crowley, Kessler, and Evans, and in connection with his opposition to the motion for summary judgment filed by the Town of Walpole and its police officers. Those previously filed oppositions, however, say nothing about the conduct of these defendants - *i.e.*, the State Police Officers[106] - and those claims should be considered as waived against

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[105] Plaintiff says that conspiracies are stuff of the night, always covert, always secretive. No doubt that is, for the most part, true. But the fact that all of the officers were focused on bringing the murderer to justice does not add up to a conspiracy. After all, although he says that all of the investigating officers formed their secret cabal, after five years of investigation, plaintiff conceded that he had no evidence *vis a vis* defendants Mattliano and Buckley. Indeed, the notion of conspiracy blinks reality. Plaintiff concedes (and if he does not, he must) that Trooper McDonald (one of the alleged conspirators by allegedly failing to disclose the negative DNA report in a timely fashion) reported the DNA report to Trooper Shea before plaintiff's arraignment on the very next day. And it also cannot be gainsaid that Trooper Shea, upon receipt of that information, disrupted the start of the arraignment by beseeching the prosecutor's attention so that he could bring that information to the attention of the prosecutor. That is hardly the stuff of covert conspirators.

[106] For example, in his opposition(# 249) to the motion for summary judgment filed by the Town of Walpole and its police officers, plaintiff devotes significant attention to the conduct of some of the Walpole Police (continued...)

the State Police Officers. *See e.g.*, *United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir. 1997).[107]

Moreover, at the hearing on the motion for summary judgment filed by the State Police Officers, apart from the false imprisonment claim (Count V) brought against defendant Shea, and the state law claim of illegal search, illegal execution of the search warrant, and conversion claim (Count X)[108] brought against defendant Jennings, and, perhaps (although not articulated in any respect), the intentional infliction of emotional distress claim (Count IX) to the extent that that claim is based on the action of Shea under Count V, and Jennings based on the action underlying Count X, plaintiff did not marshal a single fact suggesting that any of the State Police defendants were liable under the remaining pendent state law claims, and nothing further on that score set forth in his opposition to defendants' motion for summary judgment.

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[106] (...continued)
officers *vis a vis* defamation claims (# 262, pp. 19-21), but says nothing about the conduct of any of the State Police Officers. And in that same opposition, plaintiff does not even address Count X - the state law claim for "illegal search, execution, and conversion."

[107] There that Court observed (*Id.*):

> To make a bad situation worse, the appellant's briefs in this court advance these alleged constitutional violations in vague and cryptic terms. Appellate judges are not clairvoyants, and it is surpassingly difficult for us to make something out of nothing. *Cf.* William Shakespeare, King Lear act 1, sc. 4 (1605). We have steadfastly deemed waived issues raised on appeal in a perfunctory manner, not accompanied by developed argumentation, *see*, *e.g.*, *Martinez v. Colon*, 54 F.3d 980, 990 (1st Cir.), *cert. denied*, 516 U.S. 987, 116 S.Ct. 515, 133 L.Ed.2d 423 (1995); *Ruiz v. Gonzalez Caraballo*, 929 F.2d 31, 34 n. 3 (1st Cir.1991); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990), and this case does not warrant an exception to that salutary practice. "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work...." *Zannino*, 895 F.2d at 17.

To that, this court would only add that district judges, like appellate judges, are not clairvoyants. And the addenda that that is particularly true where a party makes no argument at all.

[108] Plaintiff never articulated any meaningful argument as to any of the State Police officers in relation to the pendent state law claims. In an abundance of caution, however, this court addresses those possible claims.

A. The False Imprisonment Claim

To the extent that plaintiff still maintains Officer Shea was and is liable on account of the false arrest of the plaintiff, plaintiff has failed to show a triable issue of fact.

Under settled precedent, the tort of false imprisonment consists in the "(1) intentional and (2) unjustified (3) confinement of a person, (4) directly or indirectly (5) of which the person confined is conscious or is harmed by such confinement." *Noel v. Town of Plymouth*, 895 F.Supp. 346, 354 (D.Mass., 1995); See Restatement (Second), Torts § 35 (1965); *see also Wax v. McGrath*, 255 Mass. 340, 342, 151 N.E. 317, 318 (1926) (unlawful restraint by force or threat constitutes false imprisonment). A peace officer, however, is privileged to arrest a person on the basis of a warrant fair on its face. Restatement (Second) of Torts § 122 (1965). And a peace officer is privileged to make an arrest without a warrant if the peace officer has probable cause to believe that the person arrested has committed a felony.

The premise underlying the false imprisonment claim is that plaintiff was arrested without probable cause, and Officer Shea participated in that arrest. For one thing, however, for the reasons set forth above with respect to the substantive civil rights claims, pp. 13-17, the material undisputed facts show that that arrest was issued pursuant to a lawfully issued warrant of arrest, and that is a complete bar to a false imprisonment claim. And even if, as plaintiff suggests without any factual support whatsoever, that that arrest was without a warrant, for the same reasons also set forth above, pp. 13-17, given all that was known to the arresting officers at the time of arrest, including the expert opinion of Dr.

Levine, and given that there is not even an exciting suspicion to the effect that the arresting officers were aware of the negative DNA report, there was, as a matter of law, *see* note 26, *supra*, more than probable cause to support that arrest. Since the undisputed material facts show that plaintiff was arrested pursuant to a lawfully issued warrant, at best, or on the basis of probable cause that he committed a felony, to wit: the murder of Irene Kennedy, at worst, plaintiff has not made, and cannot make, a claim of false imprisonment against Officer Shea.[109] Defendant Shea (as well as the remaining State Police officers against whom plaintiff has marshaled no facts and made no meaningful argument) is entitled to summary judgment on the false imprisonment claim.

B. The Illegal Search, Execution, and Conversion Claim

To the extent that plaintiff still maintains Officer Jennings was and is liable on account of the fact that he obtained a search warrant for plaintiff's premises,[110] or on account of the method of execution of that search warrant, or on account of conversion of the property seized as a result of that search, the undisputed material facts show that, as a matter of law, Officer Jennings is entitled to summary judgment on this claim.

For one thing, plaintiff, who chose not to brief this matter in any meaningful way, has failed to establish that Massachusetts recognizes an independent tort - apart from the

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[109] It certainly was not argued by plaintiff but if, at this late date, he should contend that Trooper McDonald is liable for false imprisonment, plaintiff has not advanced one single authority suggesting that the failure of one of many investigating officers to immediately impart exculpatory evidence to other officers, including arresting officers, constitutes false arrest or false imprisonment under Massachusetts law, and this court has found no authority to that effect.

[110] As previously indicated, pp. 31, 37-32, *supra*, and note 45, *supra*, plaintiff, in his opposition to the motion for summary judgment filed by the State Police officers, relied exclusively on his prior argument relating to pendent state law claims set forth in his opposition to the motion for summary judgment filed by the Town of Walpole. He said nothing, however, in that earlier filed opposition (# 262) about the "illegal search, execution, and conversion" claim.

constitutional tort permitted under the Massachusetts Civil Rights Act - for "illegal seizure". Indeed, it appears that it does not, *see Commonwealth v. Solis*, 407 Mass. 398, 553 N.E.2d 938 (1990),[111] and it should not be the function of this diversity court to create a cause of action under state law where none previously exists.

Moreover, for the reasons set forth above, Officer Jennings, who was not aware of the negative DNA report, clearly presented probable cause to the issuing magistrate.

To the extent that plaintiff contends that Officer Jennings is liable for the manner in which the search warrant was executed, assuming that there is an independent tort based on the means of the execution of a search warrant, and, again, plaintiff has proffered no authority supporting that position, he has proffered nothing suggesting that the manner of execution was untoward. Nothing in his Statement of Undisputed Facts indicates that to be the case, and, as indicated above, plaintiff has not even briefed the point.

Finally, to the extent that plaintiff contends that Officer Shea is liable for conversion of the evidentiary materials seized from his house, he has failed to allege, must less show, any facts that Officer Shea is liable for conversion. To make out a claim of conversion under Massachusetts law, a plaintiff must be able to show that the defendant exercised dominion or control over personal property of another with no right to immediate

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[111] In *Commonwealth v. Solis*, the Massachusetts Supreme Judicial Court observed, in the context of a case relating to extraneous contacts with jurors (*Id.* 553 N.E.2d at 940):

> Such a rule [court rule relating to extraneous contacts with jurors] would have practical teeth, unlike the more problematic prospect of establishing tort liability against a police officer who conducts an unlawful search. (Emphasis added).

That that Court thought that it would be "problematic" to "establish" an independent tort for an illegal search clearly suggests to this court that the Massachusetts courts do not recognize that as an independent cause of action.

possession. *Kelley v. LaForce*, 288 F.3d 1, 12 (1st Cir. 2002). There is no allegation, whatsoever, that defendant Jennings is in possession of the property allegedly converted, then or now, that which was seized on December 10, 1998. Indeed, apart from cash in the amount of $19,544, plaintiff has never requested the return of any property from the District Attorney's office. Undisputed Facts (# 258, ¶ 68). Plaintiff has not made, and cannot make, a claim of conversion against defendant Jennings.

C. The Intentional Infliction of Emotional Distress Claim

To the extent that plaintiff alleges claims of intentional infliction of emotional distress against Troopers Shea, Jennings, and McDonald, despite his failure to brief the point, plaintiff has fallen far short of establishing a triable issue of fact on this claim.

Under settled precedent in Massachusetts, to make out a claim of intentional infliction of emotional distress, a plaintiff must show four elements, to wit: (1) that the defendant State Police Officers "intended to inflict emotional distress or that [they] knew or should have known that emotional distress was the likely result of [their] conduct;" (2) that the defendant State Police Officers' "conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community;" (3) that the defendant State Police Officers' actions... were the cause of plaintiff's distress;" and (4) that "the emotional distress plaintiff sustained ... was severe and of a nature that no reasonable [person] could be expected to endure it." *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-45 (1976) (internal citations and quotations omitted).

For the reasons set forth above, plaintiff has not shown that any of the State Police Officers committed any wrong whatsoever. He surely cannot show that they intended to inflict emotional distress on the plaintiff.

VII. Conclusion

For the reasons set forth above, this court recommends[112] that the district judge to whom this case is assigned allow the motion for summary judgment (# 256) filed by the defendant State Police Officers in all respects.

UNITED STATES MAGISTRATE JUDGE

[112] The parties are hereby advised that under the provisions of Rule 72(b) of the Federal Rules of Civil Procedure and Rule 3(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file specific and written objections thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); United States v. Emiliano Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-379 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also, Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466 (1985).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
00-10376-GAO
00-10384-GAO
00-12541-GAO

EDMUND F. BURKE

Plaintiff

v.

TOWN OF WALPOLE, ET AL.

Defendants

REPORT AND RECOMMENDATION ON
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT
FILED BY DEFENDANT LOWELL LEVINE

October 8, 2003

COHEN, M.J.

This is a civil rights case with pendent state law claims. The action is brought against some seven named Massachusetts State Police Officers, various and sundry "John Does", "Other Officials of the Commonwealth of Massachusetts", the Commonwealth of Massachusetts, the Town of Walpole, police officers from the Town of Walpole, and various

forensic examiners, including defendants Crowley, Kessler, Evans, and Levine[113] in Civil Action No. 00-10384-GAO.[114]

Generally speaking,[115] the underpinnings of this case began with the murder of one Irene Kennedy in Walpole, Massachusetts. The crime scene search indicated that Mrs. Kennedy had multiple stab wounds, from which she died. A possible bite mark was observed on her breast, and photographs of that bite mark were made. At some point

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[113] This and the related cases have a rather tortuous procedural history. Plaintiff initially commenced suit against the Town of Walpole, certain police officers of the Town of Walpole, and Dr Levine, in the Norfolk County Superior Court. That action was removed to this court on motion of the Town of Walpole and Town of Walpole Police Officers under Civil Action No. 00-10376-GAO. Sometime later, in that same state court action, defendant Levine filed a similar notice of removal to this court. Instead of being consolidated, then and there, with Civil Action No. 00-10376-GAO, that removal was docketed as Civil Action No. 00-12541-GAO. In the meantime, plaintiff brought direct suit (*i.e.*, not a removed action) against various Massachusetts State Police Officers and the Commonwealth of Massachusetts under Civil Action No. 00-10384-GAO. On a later occasion, all of the cases were consolidated under 00-10376-GAO, and subsequent amendments to the pleadings (including an amended complaint, a second amended complaint, and a third amended complaint) have been made under Civil Action No. 00-10376-GAO.

Plaintiff has also brought suit against a forensic dentist employed by the Massachusetts Medical Examiner (Dr. Kathleen M. Crowley) and two others (Kessler and Evans) in the Massachusetts Medical Examiners Office. Those claims were brought under Civil Action No. 00-10376-GAO after consolidation. The action brought against Dr. Lowell Levine was brought, as previously indicated, under Civil Action No. 00-10384-GAO, as a removed action. In Civil Action No. 00-10376-GAO, defendants Crowley, Kessler and Evans, filed a motion to dismiss. That motion, in turn, was referred to this court for report and recommendation under the provisions of Rule 2(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts. This court issued a report and recommendation on that motion on or about May 15, 2003 (adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, (G.L. c. 12, § 11(H)).

The remaining defendants (*e.g.*, the Town of Walpole and various and sundry Walpole Police Officers in Civil Action No. 00-10384-GAO and 00-12541-GAO) have also filed motions for summary judgment. With the exception of the motion to dismiss filed by the Commonwealth of Massachusetts (which was continued on account of the unavailability of counsel for the Commonwealth), this court heard all other motions on the same day as it did with respect to the motion referred to in this Report and Recommendation. A Report and Recommendation as to the motions filed by the Town of Walpole and its police officers will follow this report and recommendation in a separate report and recommendation, as will a report and recommendation on the motion to dismiss filed by the Commonwealth of Massachusetts.

[114] The original complaint in Civil Action No. 00-10384-GAO, remains the current complaint. Plaintiff has, however, twice amended his complaint in Civil Action No. 00-10376-GAO, and the current complaint in that case is the Third Amended Complaint.

[115] A more detailed description of the material undisputed facts as found by this court are set forth where relevant to the issues raised by the motion and opposition thereto.

during the investigation, investigators of the Massachusetts State Police focused their investigation towards the plaintiff, Edmund F. Burke. Plaintiff voluntarily provided certain forensic materials to the State Police, and voluntarily provided a dental impression to Dr. Crowley, then (and now) a forensic dentist assigned to the Medical Examiner's Office of the Commonwealth of Massachusetts. That dental impression, in turn, together with the photographs of the bite mark found on Mrs. Kennedy's breast, was forwarded to Dr. Lowell Levine (hereinafter "Levine" or "Dr. Levine"), the moving defendant herein. Dr. Levine opined that the dental impressions voluntarily given to Dr. Crowley by plaintiff matched the bite marks observed on the body of the victim, Mrs. Kennedy. Based on that, and other information, the Massachusetts State Police, by and through the offices of the District Attorney, applied for and received an arrest warrant for the plaintiff. Plaintiff was subsequently arrested, and was held in custody. Thereafter, at or about the same time, a forensic DNA examination was conducted in a State of Maine laboratory, and that DNA examination apparently cast doubt on the contention that Burke murdered Kennedy.[116] Based on a *nolle prosequendum* filed some forty days thereafter by the District Attorney, plaintiff was released from custody.

At bottom, insofar as relevant here, plaintiff alleges that the conduct of all of defendants, including defendant Levine, caused his improper arrest, continued detention, and search of his premises, in violation of his Fourth Amendment rights and Fifth Amendment rights (Counts 1, 3, and 13). He also alleges pendent state law claims.

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[116] This conclusion by the Maine laboratory was brought to the attention of the initial arraignment judge in the state court on December 11, 1998, the day after plaintiff's arrest. Notwithstanding that, the district judge ordered plaintiff held without bail.

Defendant Levine has filed a Motion to Dismiss and/or for Summary Judgment (# 15 in Civil Action No. 00-10384-GAO, # 214 in Civil Action No. 00-10376-GAO), contending, among other things, that the undisputed material facts show that his conduct did not violate any rights of the plaintiff, constitutional or otherwise. And, to the extent that plaintiff's claims against Levine sound in civil rights claims, Levine further contends that he is entitled to, at the very least, qualified immunity.

I. Material Undisputed Facts vis a vis Claims against Defendant Levine

To the extent that plaintiff brings claims against defendant Levine, this court finds the following material facts to be undisputed:

1. Dr. Lowell Levine is a leading forensic dentist[117] with a practice in New York State. As a forensic dentist, he has examined "thousands and thousands" of dentitions.[118] He was and is a diplomate and a fellow of the American Board of Forensic Odontology (hereinafter "ABFO"),[119] being one of the founding diplomates of the ABFO.[120] And because of his experience and expertise, he has served as mentors for others.[121]

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117 Indeed, on one occasion, the expertise of Dr. Levine was sought by Jeffrey Denner, Esq., who represented the plaintiff in the underlying criminal case, and who serves as counsel for plaintiff in this case. Plaintiff's Statement Per Local Rule 56.1 Submitted on Behalf of Edmund Burke (# 228, ¶ 11) (hereinafter "Plaintiff's Statement of Undisputed Facts"), Exhibit C, p. 28. Exhibit C includes the deposition of Dr. Levine taken by counsel plaintiff, and is hereinafter referred to as the "Levine Deposition".

118 Levine Deposition, p. 41.

119 Plaintiff's Statement of Undisputed Facts. ¶ 11.

120 Levine Deposition, p. 42..

121 Plaintiff's Third Amended Complaint (in Civil Action No. 00-10376-GAO), ¶ 48.

2. During the course of the investigation of the death of Irene Kennedy, photographs of a bite mark on Mrs. Kennedy's breast were taken, and plaintiff provided the police with his dentition.

3. Dr. Levine was retained by the Norfolk County District Attorney's office to give an opinion as to the origin of the bite mark on Ms. Kennedy's breast;

4. On or about December 6, 1998, based on that which had been provided to him, including plaintiff's dentition, Dr. Levine opined that, as of that date, he was unable to positively state to a reasonable degree of scientific certainty that plaintiff was the source of the bite mark.

5. Thereafter, Dr. Levine was provided with additional photographs of the bite marks found on Mrs. Kennedy's breast. Based on these photographs, Dr. Levine opined with a reasonable degree of scientific certainty[122] that plaintiff caused the bite marks on Mrs. Kennedy's breast.

6. While not gainsaying the view that he knew that his opinion was important, he was unaware - purposefully so[123] - of other evidence the authorities may have had concerning he murder, he was unaware that the authorities intended to obtain an arrest warrant immediately upon his rendering of his

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[122] Dr. Levine construed the term, "reasonable degree of scientific certainty", as a "high degree of probability."

[123] Levine Deposition, (p. 37):

Q. At any time prior to your giving your opinion to a Massachusetts state trooper did you consider whether it would be appropriate to reserve judgment until the DNA testing was completed.
A. No.
Q. Why not.
A. Because we don't – the DNA testing, we were supposed to do blind testing with the bite mark evidence. The police officers and the prosecutors consider the totality of the case. So that we're not supposed to know the results of DNA testing, even if they were able to get sequence data prior to giving our results. Our testing is supposed to be done blind, not knowing what other results are. (Emphasis added).

opinion, and he was then (and currently) of the view that an arrest warrant would not be issued solely on the basis of his opinion.[124]

7. State Police officer Steven McDonald was advised by Dr. Levine that, in his [Levine's] opinion, it could be said with a reasonable degree of scientific certainty that plaintiff caused the bite marks on Mrs. Kennedy's breast.[125]

8. This opinion was reported to Walpole Police Officer James Dolan [a defendant herein] who, in turn, after the District Attorney had concluded that the plaintiff should be arrested, incorporated that opinion in a report submitted to a clerk-magistrate of the Wrentham District Court in connection with the filing of a criminal complaint and the issuance of an arrest warrant.[126]

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[124] As set forth in the Levine Deposition (p. 37):

Q. Okay...did you know that they were attempting to get a warrant?
A. I don't recall that they were attempting to get a warrant.
Q. Did you know that they were going to arrest Mr. Burke based on your opinion?
A. Police officers do not make arrests based on my opinion. They make arrests on the totality of the case.

* * * *

Q. Okay. And do you remember any conversation in which you were told that there was a drafted warrant on the computer and what they were waiting for specifically was whether or not you could give an opinion to a reasonable scientific certainty?
A. I don't remember a conversation like that. (Emphasis added).

[125] Dr. Levine testified that he usually qualifies his opinions by indicating that the phrase, "reasonable degree of scientific certainty', means a "high degree of probability". But he could not recall if he conveyed that language when he spoke to Trooper McDonald on the telephone. We accordingly assume, for purposes of this motion for summary judgment, that Dr. Levine did not convey that cautionary caveat.

[126] The report prepared in connection with the application for an arrest warrant (Docket # 67, Deposition Exhibit 32A through the top of 32B) consisted of some seventeen (17) pages of incident reports, and was replete with matters and evidence suggesting that there was probable cause to believe that the plaintiff murdered Irene Kennedy. In terms of forensics and other indicia of probable cause, the applying officer indicated that:

> On 12-01-98 Irene Kennedy was brutally murdered in Bird Park. A State Police K-9 unit conducted a track from the victim. The K-9 lead directly to Edmund Burke's front door at 315 Pleasant St.

(continued...)

In preparing that report for the clerk magistrate, Officer Dolan had no reason to believe that the opinion rendered by Dr. Levine was anything but accurate.[127] That opinion was also reported to State Police Officer Scott Jennings who, in turn, incorporated that opinion in an affidavit filed in connection with an application for a search warrant to search defendant's premises on December 10, 1998.

9. The clerk-magistrate of the Wrentham District Court, upon receipt of Officer Dolan's report, issued a warrant of arrest. The plaintiff's arrest was based on and pursuant to that arrest warrant.[128]

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126 (...continued)

Edmund was interviewed and he said that he had been sleeping all morning. Our investigation revealed two independent witnesses who saw him outside of his house in his yard on the morning to the murder. They also described the clothing he was wearing. He has denied owning clothing of this type.

Edmund has changed his story several times during the course of this investigation to try and explain his actions. They are all inconsistent.

Preliminary autopsy reports indicated that Irene Kennedy had been bitten on her breasts. These bites appear to be human. They were examined by Forensic Dentist Kate Crowley of the Medical Examiners Office and compared to impressions of Edmund Burke's teeth.

She requested that Dr. Lovell Levine examine them also. He is the leading expert in the country and has testified as such. He is a Forensic Dentist with over thirty years of experience. He determined that the marks were bite marks made by human teeth. He has also determined with reasonable scientific certainty that the they [sic] were made by Edmund Burke. (Emphasis added).

Based on the above facts, there is probable cause to believe that Edmund Burke entered Bird Park on the morning of 12-1-98 and brutally murdered Irene Kennedy. I am requesting a warrant for his arrest for murder.

127 That is to say, there is not a scintilla of evidence showing - indeed, not even a conclusory allegation - that Officer Dolan had any reason to question the expertise of the opinion rendered by Dr. Levine, someone who he [Dolan] considered to be the leading forensic expert in the field of dentistry in the country. *See* note 14, *supra*.

128 When this court issued its report and recommendation (# 231) on motions to dismiss filed by defendants Crowley, Kessler, and Evans, on May 15, 2003, adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, (G.L. c. (continued...)

10. At or about 11:00 a.m., December 10, 1998,[129] and before Officer Dolan applied for the arrest warrant, an employee at the Maine State Laboratory reported to two Massachusetts State troopers that DNA analyses concluded that the saliva found at the scene of the crime was not that of the plaintiff.

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[128] (...continued)
12, § (11H), there was a question remaining as to whether a warrant of arrest had issued. See Report and Recommendation (# 231, p. 12 and n. 17). Since that time, based on additional matters submitted in connection with the various and sundry motions for summary judgment, this court finds and concludes that all of the relevant and material evidence points to but one conclusion as a matter of law - that the warrant had issued prior to plaintiff's arrest. That is to say, all the material evidence would not permit a reasonable trier of fact to conclude that plaintiff's arrest was not made pursuant to a warrant.

Officer Dolan testified at his deposition that he applied for an arrest warrant, and that that arrest warrant was issued by Clerk Magistrate Edward Doherty on December 10th. The arrest warrant and return thereon has been submitted as an exhibit (Exhibit U to the Statement of Undisputed Facts (# 219) filed by the Town of Walpole and its various police officers) and # 259, Exhibit U. The first docket entry - entitled to conclusive effect in the absence of a showing to the contrary, *Howard v. Local 74, Wood, Wire and Metal Lathers International*, 208 F.3d 930, 934 (7th Cir. 1953) - in plaintiff's underlying criminal case indicates that he was arrested on a warrant. (# 259, Exhibit U). State Police Officer Kevin Shea, in response to a question put to him at a deposition by counsel for the plainttiff, testified that the arresting officers had a warrant at the time they arrested the plaintiff (# 259, Exhibit D - Deposition of Kevin Shea, pp. 138-139). Plaintiff has proffered nothing of substance which even remotely suggests to the contrary. All he says is that Town of Walpole Police Chief testified to the contrary. The rather quixotic portion of the testimony he relies upon, however, hardly says that a warrant was not issued before the arrest. When asked when he [Chief Betro] formed an opinion as to the guilt of plaintiff, Chief Betro testified (Town of Walpole Statement of Undisputed Facts (# 219, Exhibit W, p. 89))

> Well, after the arrest was made I was informed as to, I was not privy at that time to any meetings which were, or any, that were going on in my station with the District Attorney and the state police and my detectives, as well. The decision was made to seek an arrest warrant. After the fact I was told to seek an arrest warrant. (Emphasis added)

Plaintiff excerpts the underscored above for the remarkable position that a warrant was not issued before the arrest of the plaintiff. What plaintiff omits, however, is that which immediately follows in that same answer, to wit:

> An Affidavit was put together by the state police and an arrest warrant, Detective Dolan went to court to obtain the warrant and they went down to make the arrest. At that point in time I was informed they were going down to arrest Ed Burke. (Emphasis added).

In context, plaintiff cannot, from this, realistically suggest that the warrant was issued after plaintiff's arrest. It is but a line taken out of context in connection with a question put concerning an entirely different matter and, purposefully or otherwise, left in an ambiguous state by the examiner - in this case, counsel for the plaintiff.

[129] There is a question as to this date. Other evidence suggests that Trooper McDonald became aware of the DNA reports on December 11, 1998, after plaintiff's arrest, and not on December 10, 2003. State Police officer Kevin Shea testified at his deposition that he was first notified of this fact by Trooper Steven McDonald on December 11 - the date of plaintiff's arraignment, and that he [Shea] immediately relayed that information to the prosecutor who, in turn, advised plaintiff's defense counsel and the arraignment judge. For purposes of the motion for summary judgment, however, this court assumes the December 10th date.

That information was not made known to Dr. Levine at any time prior to his rendering his opinion, or, indeed, prior to the arrest of the plaintiff.[130] Nor was that information made known to Officer Dolan before he applied for the arrest warrant, or to any arresting officer until after the arrest of the plaintiff.[131]

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[130] In a subsequently filed pleading, that is, his opposition (# 262, p. 5)t o a motion for summary judgment filed by the Massachusetts State Police Officers, plaintiff misrepresents the record in suggesting that Dr. Levine was aware of the DNA report before the arrest of the plaintiff. Plaintiff says (# 262, p. 5):

> At 11:00 a.m., on the morning of December 10, 1998, Theresa Callichio of the Maine State Police Lab informed Trooper McDonald that the DNA excluded Mr. Burke. McDonald claims that he told at least two people of this call, Assistant District Attorney John Kivlan, (a prosecutor) and Lowell Levine. Lowell Levine, iin an astonishing display of arrogance, immediately assumed that the DNA must have been contaminated, and told that to McDonald. Deposition Transcript of Steven McDonald, p. 109, appended as Exhibit L to Defendant Mattaliano, et al's Statement of Undisputed Facts. (Emphasis added).

Putting to one side plaintiff's unsupported oratory ("an astonishing display of arrogance"), which is not apparent from the record, and putting to one side plaintiff's erroneous reference (there is no p. 109 to the Deposition transcript appended as Exhibit L - this court, however, searched other submissions and found page 109 in the Deposition of Steven McDonald at Exhibit I of plaintiff's own earlier opposition (# 228) to the motion to dismiss or for summary judgment filed by defendant Levine), the suggestion that Levine was aware of the DNA report before the arrest of the plaintiff is erroneous, at best, deceiving, at worst. In fact, as it shows without equivocation on page 108 of that same deposition, that conversation was held on December 11, after plaintiff's arrest, at or about the time of arraignment, to wit:

Q. Okay. Now let's get back to Lowell Levine, you have this conference with Levine on the day of arraignment?
A. Correct.

Counsel for plaintiff, who asked the very question, and who received the very answer, surely must have known better to suggest, in a misleading way, that Levine (or anyone else except, perhaps, Trooper Steven McDonald) knew anything about the DNA reports before the arrest of the plaintiff.

Elsewhere, in a similar vain, counsel for plaintiff allows in his opposition to the motion for summary judgment filed by the Massachusetts State Police officers (# 262, p. 5):

> Later that afternoon, McDonald told Levine that the police still desired to arrest Mr. Burke and the decision hinged on Levine's willingness to stand by his previously drawn conclusions. Id. at 130.

The reference to page 130 of the McDonald deposition transcript, however, says no such thing. This court's reading of the entirety of the McDonald affidavit reveals nothing of the sort. It is, again, something that plaintiff has woven from whole cloth without any regard to the true state of the record before this court. While plaintiff may wish to roll his dice before a jury, a consistent theme throughout his oppositions, see note 23, *infra*, he may not take liberty with the record and misrepresent that record to bring his case before a jury.

[131] At the hearing before this court, which included motions for summary judgment filed by all the parties (excepting Crowley, Kessler, Evans, or the Commonwealth of Massachusetts), counsel for plaintiff, while unable to point to any factual support, argued, for the first time, insofar as this court can determine, that it could be reasonably inferred that since Trooper Steven McDonald and Trooper Robert Martin received the information

(continued...)

11. As of the present time, Dr. Levine remains of the opinion to a reasonable degree of scientific certainty[132] that the bite mark on the breast of Mrs. Kennedy matched the dentition of the plaintiff. And plaintiff has proffered no

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[131] (...continued)
concerning the DNA testing on December 10, 1998, one or the other imparted that same information to Officer Dolan prior to the time that he applied for the arrest warrant, and prior to the time that plaintiff was arrested. Until the hearing on the motions, plaintiff had not even alleged that Officer Dolan was made aware of the DNA report.

That, however, is pure speculation and conjecture - a suggestion woven from whole cloth, and nothing else. Indeed, the only evidence which plaintiff has discovered on this matter is that, whatever the date Trooper McDonald may have thought that he received that information, he did not impart that information to anyone until December 11, 1998, the day after plaintiff's arrest, and, then, only to Massachusetts State Trooper Kevin Shea and Assistant District Attorney John Kivlan - not to Officer Dolan at any time. Nothing could be clearer from the testimony of Trooper Steven McDonald, upon which plaintiff relies as suggesting that Trooper McDonald was aware of the DNA tests on December 10, to wit (Exhibit I to Plaintiff's Local Rule Statement (# 228 - Deposition of Steven McDonald, pp. 108-109):

A. I spoke with the Maine state police directly, the lab.
Q. And they told you they excluded him [Burke]?
A. Excluded. The profile does not match.
Q. And it's your testimony you communicated that immediately to John Kivlan?
A. Yes.
Q. Do you know as you sit here one way or the other whether that was communicated to the Judge at the arraignment.
A. I don't know. I talked to – Sergeant Shea was at the arraignment with [Assistant District Attorney] Jerry Pudolsky who was the ADA handling the case and I also spoke with Kevin and let him know what was going on.
Q. Did you speak to Pudolsky directly?
A. No, I did not. John Kivlan and Jerry Shea were the two I spoke to.

And that arraignment attended by ADA Pudolsky and Trooper Shea, of course, was held on December 11, the day after plaintiff's arrest. Town of Walpole's Local Rule 56.1 Statement (# 219 - Exhibit N (Deposition of Kevin Shea, pp. 143-144)); Town of Walpole's Local Rule 56.1 Statement (# 219 - Exhibit V (Deposition of Gerald Pudolsky, pp. 37-43)). State Police Officer Shea also testified that he first learned of the DNA results on December 11 - the day of the arraignment, and not on the day of arrtest (# 259, Exhibit D -(Deposition of Kevin Shea, p. 143)).

[132] As Dr. Levine (then and now) understood that phrase, to wit: a "high degree of probability."

meaningful evidence to the contrary,[133] putting to one side the mere *ipse dixit* of counsel for plaintiff.[134]

II. The Summary Judgment Standard

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[133] Consistent with discovery and other scheduling deadlines, first imposed by the district judge to whom this case is assigned, and later by this court on motions for extensions of time, the plaintiff did not designate any expert on the matter of forensic dentistry or bite mark comparisons.

In terms of actual evidence, plaintiff only proffered his own lay opinion, to wit: "It is scientifically impossible for my dentition to match bite marks found on Irene Kennedy's body." (Affidavit of Edmund F. Burke, # 227, ¶ 6), and evidence of the fact that DNA analyses excluded plaintiff as the owner of the saliva found on Mrs. Kennedy's body. The Burke Affidavit says nothing, since there is nothing whatsoever showing that he is qualified to give any sort of scientific opinion. So, too, with the DNA evidence. That augured against a match of saliva, but it did not, and still has not, shown that Dr. Levine's opinion was or is inaccurate to a reasonable degree of scientific certainty.

Plaintiff has one more arrow in his sheath in an attempt to suggest to the contrary. Contrary to prior orders of this court relating to the designation of experts, plaintiff attempted to do indirectly that which he could not do directly. He submitted his Supplemental Opposition to Lowell Levine's Motion for Summary Judgment (# 226), something which plaintiff describes as a timely filed "Rule 26 Report and Affidavit of Richard Souviron, D.D.S. We do not know what plaintiff means by saying that this filing was timely. It was not.

On February 27, 2003, given the fact that plaintiff has had more than three years in which to prepare his case, this court, by Order (# 208) of that same date, denied plaintiff's motion for an extension of time to designate experts (# 205). Plaintiff did not seek any review of that Order (# 208) by the district judge to whom this case is assigned consistent with the provisions of Rule 72(a), F.R. Civ. P. or Rule 2(a) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts. Instead, some two months later, he filed a motion for reconsideration (# 213) of that earlier order. On April 10, 2003, this court denied that motion for reconsideration. Again, plaintiff did not seek any review of that Order (# 208) by the district judge to whom this case is assigned consistent with the provisions of Rule 72(a), F.R. Civ. P. or Rule 2(a) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, and any attempt to do so now would be clearly untimely and improper. *See e.g.*, Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *see also*, *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466 (1985).

And, in any event, Dr. Souviron says nothing which casts any doubt whatsoever on the opinion of Dr. Levine. At best, Dr. Souviron avers that he [Sourverin] is unable to form an opinion on the basis of that given to him by counsel for the plaintiff. That says nothing.

[134] Notwithstanding the fact that co-counsel for plaintiff previously used the expert services of Dr. Levine for his [then] client's benefit, lead counsel for the plaintiff off-handedly, and without citation to any meaningful authority, simply argued that bite mark evidence is but "junk science." That view, however, is not shared by any others who should know, so far as this court can determine. To the contrary, some thirty jurisdictions (and there may be more, but simply not reported), including the Commonwealth of Massachusetts, have concluded that, far from being the "junk science" that counsel now suggests, bite mark evidence is relevant, reliable, and admissible. *See e.g.*, *Commonwealth v. Cifizzari, 397 Mass. 560, 492 N.E.2d 357 (1986); State v. Blamer,* 2001 WL 109130 at *4 (Ohio App. 5 Dist., 2001); *Seivewright v. State,* 7 P.3d 24, 29-30 (Wyo.2000); *Brooks v. State,* 748 So.2d 736, 739 (Miss.1999); *People v. Marsh,* 177 Mich.App. 161, 441 N.W.2d 33, 36 (1989); *State v. Armstrong,* 179 W.Va. 435, 369 S.E.2d 870, 877 (1988); *State v. Stinson,* 134 Wis.2d 224, 397 N.W.2d 136, 140 (Ct . App.1986); *Spence v. State,* 795 S.W.2d 743, 750-52 (Tex.Crim.App.1990); *Sievewright v. State of Wyoming*, 7 P.3d 24 (2000); see also, *Brooks v. State of Mississippi*, 748 So.2d 736, 746-47 (1999)(referring to some twenty or more jurisdictions in which bite mark evidence is admissible).

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed `to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)(quoting Fed.R. Civ. P. 1).

To survive a motion for summary judgment, the opposing party must demonstrate that there is a genuine issue of material fact requiring a trial. Fed. R. Civ. P., 56(e); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As the Supreme Court recently has made clear, the standard for granting summary judgment "mirrors" the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). That is, the inquiry focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no `genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

A plaintiff may not obtain a trial merely on the allegations in its complaint, *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 289-290 (1968), or by showing that there is "some metaphysical doubt as to the material facts," Matsushita, supra, 475 U.S. at 586 (citations omitted). Where the non-moving party will bear the burden of proof at trial, Rule 56(c) mandates the entry of summary judgment against that party where it "fails to make a showing sufficient to establish the existence of an element essential to that party's case...." *Celotex Corp. v. Catrett*, 477 U.S. at 322. That is to say, to avoid summary

judgment, the opposing party "...must produce at least some evidence reasonably affording an inference supporting the existence of a triable issue of fact [with respect to the element which the opposing party must establish at trial]." *Santiago, et al. v. Group Brasil, Inc.*, 830 F.2d 413, 416 (1st Cir. 1987).[135]

III. The Civil Substantive Rights Claims Sections 1983 and G.L. c. 12, § 11 I (Counts VII and XIII)

In Counts VII and XIII, plaintiff alleges that Dr. Levine violated G.L. c. 12, § 11I and 42 U.S.C. § 1983, respectively, in that he caused plaintiff to be arrested and detained in the absence of probable cause, and in that he caused plaintiff's premises to be searched without probable cause,[136] all in violation of the Fourth Amendment and the Massachusetts Declaration of Rights.

Defendant Levine moves to dismiss on the grounds that, on the basis of the undisputed material facts, plaintiff cannot make out a claim of an illegal arrest, an illegal detention, or an illegal search. Defendant Levine also contends that he is immune from liability under the civil rights statutes.

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[135] As a consistent theme throughout this case, counsel for plaintiff simply allows that issues such as knowledge, intent, whether or not the parties engaged in a conspiracy, and the like, are but fodder for the jury. But that, of course, is totally inconsistent with *Santiago* and a host of First Circuit cases addressing the summary judgment standard. Only if plaintiff shows, at the summary judgment stage, that there is a triable issue of fact as to a material fact forming an element of an offense, that is, something more than mere conjecture, does the matter reach the jury, regardless of whether that element is one of knowledge, intent, or the like. *See e.g.*, *Local No. 48, United Broth. of Carpenters and Joiners of America v. United Broth. of Carpenters and Joiners of America*, 920 F.2d 1047, 1051 (1st Cir. 1990)("Even in cases involving so ineffable a matter as motive or intent, summary judgment may be warranted 'if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.' *Medina-Munoz*, 896 F.2d at 8; *see also Rossy v. Roche Products, Inc.*, 880 F.2d 621, 624 (1st Cir.1989); *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 109-10 (1st Cir.1988).")

[136] We assume that part of plaintiff's civil rights claims against defendant Levine are based on a claim that, based on his [Levine's] expert opinion, his [plaintiff's] premises were searched without probable cause. But that is far from clear, since, in his state law claim against the defendants claiming an illegal search for want of probable cause, an illegal execution of the search warrant, and conversion (*i.e.*, improper retention of the materials seized) (Count XV) , plaintiff specifically excludes defendant Levine as a defendant.

Before addressing the matter of immunity, qualified or otherwise, this court must first determine whether any conduct on the part of Levine caused plaintiff to suffer a constitutional injury. *See e.g.*, *Abreu-Guzman v. Ford*, 241 F3d 69, (1st Cir. 2001).[137]

At bottom, plaintiff seemingly alleges that Dr. Levine intentionally caused his arrest, continued detention,[138] and the search of his premises, by fabrication of evidence which supplied probable cause for his arrest, continued detention, and the search of his premises - *i.e.*, his opinion to a reasonable scientific certainty that the bite mark on Mrs. Kennedy's breast was caused by teeth identical to the dentition of the plaintiff. Alternatively, plaintiff seemingly contends that Dr. Levine was reckless in rendering that opinion, resulting in his illegal arrest, continued detention, and the search of his premises.

We assume - indeed, it can hardly be gainsaid - that a state actor[139] who intentionally, deliberately and purposely causes the arrest of another in the absence of

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137 There the Court stated (Id. at 73):

> The analysis of a qualified immunity defense is identical for actions brought under § 1983 and *Bivens*. *Graham v. Connor,* 490 U.S. 386, 394 n. 9, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The Supreme Court has set forth a preferred method of analysis, most recently reinforced in *Wilson v. Layne,* 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). First, the court must "determine whether the plaintiff has alleged the deprivation of an actual constitutional right." *Id.* at 609, 119 S.Ct. 1692, *quoting Conn v. Gabbert,* 526 U.S. 286, 290, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). Second, the court must "proceed to determine whether that right was clearly established at the time of the alleged violation." *Id.* Only if these two questions are answered in the affirmative does the court address the particular conduct in question.

138 After his arrest, the plaintiff was detained until on or about January 20, 1998, at which time he was released when the district attorney *nol prossed* the complaint. His defense counsel, however, deliberately chose not to move for release on bail (# 259, Exhibit V, Deposition of Jeffrey Denner, Esq., pp. 29-30).

139 Levine, referring to language in *Scott v. Hern*, 216 F.3d 897 (10th Cir. 2000), suggests, but does not seriously contend (given the qualified immunity defense asserted - a defense limited to state actors) , that he was not a state actor when he did that which he was alleged to have done. *Scott*, however, provides no safe haven for Levine, since that holding was unique to a psychiatrist, not retained by the state, who signed a civil commitment order under a statutory scheme which was available to all private citizens. For the purposes of this motion for summary judgment, this court assumes that Levine was a state actor - particularly in view of the fact that it need not be shown that he was a state actor to impose liability under the Massachusetts Civil Rights statute. *E.g.*, *Swanset Dev. Corp. v. City of Taunton*, 423 Mass. 390, 668 N.E.2d 333, 337 (1996).

probable cause violates the Fourth Amendment rights of the person so arrested and detained. And, insofar as this court can determine, defendant does not, at the present time, contend to the contrary. We further assume that a state actor who recklessly -*i.e.* without regard to the known constitutional rights of another - causes the arrest of another in the absence of probable cause violates the Fourth Amendment rights of the person so arrested and detained.[140]

That assumption notwithstanding, however, plaintiff has not, on the basis of the undisputed material facts, made out a substantive claim under Section 1983 or the Massachusetts civil rights statute.

First and foremost, plaintiff's major premise for his syllogism is simply wrong. That premise is that the opinion rendered by Dr. Levine was false. Plaintiff, however, has simply not, on the basis of the material undisputed facts, shown that the opinion was false - much less that it was fabricated, intentionally or recklessly. As indicated above, Dr. Levine, a diplomate of the ABFO - indeed, one of the founding fathers of the ABFO - opined to a reasonable degree of scientific certainty, based on the evidence presented to him, that the

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[140] Because this court finds and concludes that, on the basis of the material undisputed evidence, plaintiff cannot make a showing that the defendant Levine intentionally or recklessly caused the plaintiff to be arrested and detained without probable cause, or intentionally or recklessly caused the defendant's premises to be searched without probable cause, this court does not reach the question of immunity except to the limited extent set forth below , pp. 18-19, vis a vis a suggestion, but not an allegation, that Dr. Levine was negligent in reaching the conclusions that he did reach. Suffice to say that, contrary to the contention of the defendant Levine, he is not absolutely immune from suit under Section 1983 or the Massachusetts Civil Rights statute. *See e.g.*, *Keko v. Hingle*, 318 F.3d 639, 642-644 (5th Cir. 2003), and cases set forth therein. On the other hand, however, under settled First Circuit precedent, he is entitled to assert a defense of qualified immunity. *Camilo-Robles v. Hoyos*, 151 F.3d 1, 10 (1st Cir. 1998); *see also*, *Keko*, *supra*.

And for purposes of this motion for summary judgment, this court assumes that it is (and was at the time of the events referred to in the Complaint) well established that it is a violation of one's civil rights when a state actor intentionally (or recklessly without regard to the rights of the victim) causes another to be arrested and detained without probable cause, or causes the search of another's property without probable cause.

bite mark on Mrs. Kennedy's breast matched the dentition of the plaintiff. At the questioning of Dr. Levine at the deposition noticed by counsel for the plaintiff, Dr. Levine, in response to a question put to Dr. Levine by counsel for the plaintiff, reiterated that same view and testified that conclusion remains to be his conclusion. And for the reasons set forth above, Part I.11, and notes 21 through 22, plaintiff has not shown, and, indeed, cannot show, that the opinion was false.

Secondly, even if plaintiff could make a showing (which he cannot) that the opinion rendered by Dr. Levine was false, there is not a gossamer of evidence from which a reasonable trier of fact could reasonably infer that Dr. Levine intentionally falsified an opinion with the intent that that opinion be used for the purpose of arresting and detaining the plaintiff without probable cause, or for the purpose of causing plaintiff's residence to be searched in the absence of probable cause.[141]

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[141] On this, it seems, counsel for plaintiff makes but two points. He says that prior conduct of defendant Levine in the preparation of an earlier affidavit filed in this case warrants the inference that his conduct was intentionally done to insure that the defendant was arrested without probable cause. And he further says - as he did in response to many inquiries put to him during the course of oral argument - that the "totality of the circumstances" warranted that inference.

Neither point warrants an escape from *brevis* disposition. On the affidavit matter, Dr. Levine, in connection with an earlier-filed motion to dismiss for want of *in personam* jurisdiction, averred that, among other things, he had, in connection with plaintiff's criminal case - concluded that he could not rule out plaintiff as the person whose bite marks appeared on the breast of Mrs. Kennedy. In later matters, including his deposition, Dr. Levine said that he concluded to a reasonable degree of scientific certainty that the bite marks found on Mrs. Kennedy's breast were made by plaintiff's dentition. There is nothing inconsistent - much less sinister - in these two positions. In connection with an earlier motion to dismiss which had nothing to do with the scope of all of his conclusions, Dr. Levine simply averred that he had, among other things, concluded that plaintiff could not be ruled out. That is, in fact, quite true and consistent with that which Dr. Levine has consistently maintained. On December 6, 1998, based on that which was then and there supplied in terms of evidentiary materials, Dr. Levine could not venture an opinion beyond the view that plaintiff could not be ruled out. See Paragraph I.4, *supra*. There is no consistency, much less the sort of consistency from which a reasonable trier of fact could take the giant leap to conclude that Dr. Levine intentionally falsified his findings.

And counsel's mere reference to the "totality of the circumstances", without more, hardly fills the bill of showing any sort of intentional conduct of the sort suggested by the plaintiff.

Thirdly, even if plaintiff could make a showing (which he cannot) that the opinion rendered by Dr. Levine was false, there is not a shred of relevant and material evidence from which a reasonable trier of fact could reasonably infer that Dr. Levine recklessly falsified an opinion with the intent that that opinion be used for the purpose of arresting and detaining the plaintiff without probable cause, or for the purpose of causing plaintiff's residence to be searched in the absence of probable cause. The record evidence shows that Dr. Levine did not rush to judgment. To the contrary, he eschewed suggesting that, to a reasonable degree of scientific certainty, the bite marks were a match to plaintiff's dentition, on December 6, 1998. If he was reckless (or, indeed, intentional) in his conduct, he would have, one might reasonably suspect, jumped to his final conclusions at that time. But he did not. At oral argument, counsel for plaintiff contended that Dr. Levine was reckless in not awaiting the results of the saliva (DNA) analysis. But that surely misses the mark. As Dr. Levine fully explained to counsel for plaintiff at his deposition in response to questions put to him by counsel for the plaintiff, his assigned task was not to assess the guilt or innocence. To the contrary, it was, as a "blind" procedure, his responsibility to make his own reasoned and thoughtful judgment based on his own experience and expertise, unfettered by the thoughts and beliefs of others. Indeed, had he permitted himself to be tainted by the doings of others, that would have been reckless, rather than the contrary.

Finally, plaintiff says that recklessness may be inferred by reason of his use of the term, "reasonable degree of scientific certainty", and equating that with a standard of "a high degree of probability." On this, plaintiff ruminates (Plaintiff's Opposition (# 225, pp.

9-10)) as follows: (1) the ABFO, in its guidelines, suggests that the phrase "reasonable degree of scientific certainty" means "virtual certainty - *i.e.*, no reasonable or practical possibility that someone else did it; (2) that the AFBO's construction of the term, "reasonable degree of scientific certainty", comports with the ordinary parlance and dictionary usage; (3) that Dr.Levine construed that term to mean a "high degree of probability", contrary to that suggested by the ABFO; and therefore (4) he was reckless in rendering that opinion.

Without gainsaying the text of the ABFO guidelines, the remainder of the premises fall. For one thing, in response to a question put to him by counsel for the plaintiff at his deposition, Dr. Levine, a Diplomate of the ABFO, indeed, one of its founders, says that that language is totally consistent with his understanding that the phrase means a "high degree of probability." Dr. Levine is in a far better position to interpret those guidelines than is the counsel for the plaintiff. For another thing, plaintiff may be right in his interpretation of dictionary usage, but that is quite beside the point. For the question is not one of parlor room understanding, but legal understanding. And on that, all authorities march to the same drummer, to wit: that that phrase, as is in the case of its kissing cousin, "reasonable degree of medical certainty",[142] is,in a sense, a wooden one, designed to insure that that opinion is not based on pure speculation. See e.g., *Schulz v. Celotex Corp.*, 942 F.2d 204,

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[142] At the hearing on the motion, in response to an inquiry by this court, counsel for plaintiff suggested, without any meaningful rationale, that there is some sort of difference between a reasonable degree of scientific certainty and a reasonable degree of medical certainty. If there is a difference, plaintiff has failed to delimit that difference. Both sorts of opinions - medical and scientific - are, in reality, bottomed on "scientific" analyses. When one renders a medical opinion, it is based on medical science, and nothing else. Indeed, counsel for plaintiff, in his own Memorandum in Opposition (# 225, p. 10, refers to the ABFO guidelines in terms of "reasonable medical certainty.") (Emphasis added).

208-09 (3d Cir. 1991);[143] *Pupkar v. Tastaca*, 999 F.supp. 644, 645 n. 1 (D.Md. 1998);[144] Black's Law Dictionary, Seventh Ed. P. 1273.[145] Dr Levine's use of the phrase "reasonable degree of scientific certainty" and equating that with a legal standard of "a high degree of probability" is fully consonant with the legal interpretation of that phrase, and no reasonable trier of fact could reasonably conclude therefrom that Dr. Levine recklessly rendered the opinion that the bite marks on Mrs. Kennedy's breast were, to a reasonable degree of scientific certainty, consistent with the dentition of the plaintiff.

One further observation must be made. In his complaint against defendant Levine (Count XIII), plaintiff alleges that Levine intentionally fabricated evidence, or that he rendered that opinion with reckless disregard for the truth.[146] And that was precisely the argument made by counsel at the hearing. In his opposition, however, he intimates, but does not directly address, a suggestion that Levine could be liable under Section 1983 and the Massachusetts Declaration of Rights. Plaintiff's Opposition (# 225, p.14). To the extent

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143 The phrase "reasonable medical certainty" is only a "...useful shorthand expression that is helpful in forestalling challenges to the admissibility of expert opinion."

144 There the court observed:

"There is no appellate court opinion in Maryland that has held that the mantra 'within a reasonable degree of medical probability' is absolutely required before each and every medical expert opinion. It is understood, however, that '[t]hese wooden phrases are required to make sure that the expert's opinion is more than speculation or conjecture."

145 To wit:

reasonable medical probability. In proving the cause of an injury, a standard requiring a showing that the injury was more likely than not caused by a particular stimulus, based on the general consensus of recognized medical thought. - Also termed *reasonable medical certainty*. (Emphasis added).

146 In the controlling paragraph (¶ 118), plaintiff alleges *vis a vis* Levine:

Assuming the police have accurately reported the statements made by Levine, Levine's knowing and malicious or at least negligent **and** reckless disregard for the truth....

that he does, however, that is to the extent that plaintiff means to suggest and contend that negligence on the part of Dr. Levine in reaching the conclusions that he did reach warrants an award of damages to the plaintiff under Section 1983 or G.L. c. 12, § 11I, the doctrine of qualified immunity, applicable to Levine, see note 28, *supra*, forestalls such relief. *See e.g.*, *Hart v. O'Brien*, 127 F.3d 424, (5th Cir. 1997).[147]

In short, on the basis of the undisputed evidence, plaintiff has not made, and cannot make, a triable claim that the defendant violated his civil rights in violation of the proscriptions of Section 1983 or the Massachusetts Declaration of Rights. Plaintiff's sole argument in this regard is that he was arrested without probable cause, detained without probable cause, and that his premises was searched without probable cause. Given that known to the arresting officers at the time Officer Dolan applied for the complaint, which included an expert opinion by Dr. Levine, an opinion not yet shown to be incorrect in any

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[147] There that court concluded, among other things (*Id.*):

> Under *Siegert,* we must consider at the threshold whether Hart even alleges a Fourth Amendment violation with regard to the false information claims. 500 U.S. at 232, 111 S.Ct. at 1793. The Supreme Court in *Franks v. Delaware* established that an officer is liable for swearing to false information in an affidavit in support of a search warrant, provided that: (1) the affiant knew the information was false or would have known it was false except for the affiant's reckless disregard for the truth; and (2) the warrant would not establish probable cause without the false information. 438 U.S. at 171, 98 S.Ct. at 2684. Allegations of negligence or innocent mistake are insufficient. *Id.* Therefore Hart's claim that O'Brien was at least reckless in including the inaccurate statements states a valid cause of action under the Fourth Amendment.
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> * * * *
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> The officers may have been negligent in their investigation, and wrong to conclude that they had probable cause. However, negligence is insufficient to create liability for police officers under *Malley*. Therefore we find that O'Brien is protected by qualified immunity on this point. (Emphasis added).

The doctrine of qualified immunity is also applicable to actions brought under the Massachusetts civil rights statute (G.L. c. 12, § 11I). *Howcraft v. City of Peabody*, 51 Mass.App.Ct. 573, 595 (2001).

respect, there was clearly probable cause[148] to believe that plaintiff murdered Irene Kennedy.[149] He is entitled to judgment as a matter of law on Counts VII and XIII.[150]

IV. The Civil Rights Conspiracy Claims (Count VI)

In Count VI, plaintiff generally alleges that all defendants named in that complaint conspired to deprive the plaintiff of his civil rights.

In connection with an earlier motion to dismiss filed by defendants Crowley, Kessler and Evans, in Civil Action No. 00-10376-GAO, this court observed (Report and Recommendation (# 231, pp. 17-19)(adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an

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[148] We do not view it insignificant that counsel for the plaintiff in the underlying criminal case, and co-counsel here, never suggested that there was not probable cause to arrest the plaintiff - even after counsel was advised about the exculpatory DNA results. To the contrary, counsel at that time chose not to seek plaintiffs release, although he clearly could have done so.

Throughout his response to the current motion, as well as in his responses to other similar motions, plaintiff, referring to *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999), says, *e.g.*, # 262, p. 7, without any specific page reference (and, not surprisingly so), "[t]he question of the existence of probable cause is for the jury to determine." That, however, is only half correct and, in context misleading. It is for the jury to determine the underlying facts. But it is for the court, and for the court alone, to determine whether the underlying facts (as found by the jury, or, as here, the undisputed material facts) provide probable cause. *E.g.*, *Martin v. Applied Cellular Technoloogy, Inc.*, 284 F.3d 1, 7 (1st Cir. 2002).

[149] Elsewhere we have concluded that plaintiff cannot ever establish that he was arrested without a warrant. See Part I.9 and note 16, *supra*. But even if plaintiff could show otherwise, it would make no difference. And that is because all of the evidence presented to the clerk magistrate in seeking the issuance of a complaint and warrant was known to the arresting officers, and that same probable cause would support a warrantless arrest as well.

[150] In this court's report and recommendation (# 231) on motions to dismiss filed by defendants Crowley, Kessler, and Evans, on May 15, 2003 (adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, G.L. c. 12, § 11H)), this court did not recommend dismissal of the civil rights claims brought against defendant Crowley. But plaintiff can find no comfort from that conclusion *vis a vis* the civil rights claims brought against defendant Levine. The civil rights claims brought against Crowley were measured in a completely different context - *i.e.*, they were considered in the context of a motion to dismiss, not a motion for summary judgment - where this court was limited to a reading of the four corners of the Third Amended Complaint. Indeed, this court noted (Report and Recommendation, pp. 12-14) that it might well be a different case if the claims against Crowley were measured within the context of a motion for summary judgment or a motion for judgment as a matter of law at trial.

additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, G.L. c. 12, § 11H)):

> Notwithstanding that said immediately above *vis a vis* plaintiff's substantive claims against Crowley under Section 1983 (Count 2) and the Massachusetts Civil Rights Act (G.L. c. 12, § 11 I)(Count 4), plaintiff has not fairly pleaded a conspiracy to violate plaintiff's civil rights under Section 1983 as alleged in Count 3 and the remainder of the allegations of the Third Amended Complaint.

It goes without saying that, in order to establish a conspiracy, plaintiff must allege sufficient facts that the defendant Crowley agreed with others, tacitly or otherwise, to violate plaintiff's civil rights. Vague and conclusory allegations of the existence of a conspiracy are not enough to sustain a plaintiff's burden - a complaint must contain factual allegations suggesting that the defendants reached a meeting of the minds. *See e.g.*, *Amundsen v. Chicago Park Dist.*, 218 F.3d 712, 718 (7th Cir.2000); *Francis-Sobel v. Univ. of Maine*, 597 F.2d 15, 17 (1st Cir.1979); *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir.1980) (affirming dismissal because complaint "neither elaborates nor substantiates its bald claims that certain defendants 'conspired' with one another"). That is to say, merely asserting the existence of a conspiracy by pleading the conclusory word, "conspiracy', does not make the day. *E.g.*, *Hanania v. Loren-Maltese*, 212 F.3d 353, 356 (7th Cir.2000).

In this case, that is all that plaintiff has alleged. In Count 3, plaintiff simply alleged:

> 81. By having engaged in the conduct described above, the Defendants conspired to deprive Mr. Burke of the equal protection of the law or of the equal privileges and immunities under the law, and they acted in furtherance of the conspiracy, which resulted in the injury to Mr. Burke described above, in violation of 42 U.S.C. § 1983. (Emphasis added).

That conclusory allegation, however, stands alone. There is not a single, solitary allegation of a fact in the 26 pages, more or less, of the Third Amended Complaint which even touches upon any meeting of the minds, tacitly or otherwise, between defendant Crowley and any other person. To the contrary, the entire thrust of the case against Crowley is that she, on her own, in order to advance her career, fabricated a forensic opinion. There is nothing alleged whatsoever that she shared her alleged scheme with any other defendant or person. Indeed, plaintiff specifically alleges (Third Amended Complaint, ¶ 57), contrary to any notion that defendant Crowley shared a common design or scheme with the other defendants, most of whom are state police officers, that she "lied" to the state police as well. Plaintiff's

> use of the magic talisman, "conspired", in Count 3, against a backdrop of an allegation that it was the "Defendants" (without any specificity as to which defendants, if any) who so conspired, fails to meet the requirements of established law in this Circuit, *Francis-Sobel*, *supra*, and *Slotnick*, *supra*, that a bare minimum of facts must be pleaded in support of a conspiracy claim. (Footnotes omitted).

What we said there applies in spades within the context of a motion for summary judgment. That is to say, when a plaintiff claims that defendants conspired to violate his civil rights, he must proffer specific facts tending to show that a conspiracy existed to survive a summary judgment motion; conclusory allegations will not suffice. *E.g.*, *Easter House v. Felder*, 852 F.2d 901, 919 (7th Cir.1988). To be sure, since a conspiracy is rarely proven by direct evidence, a plaintiff may satisfy that burden with circumstantial evidence. But aside from a boilerplate suggestion by counsel at the hearing suggesting that the "totality of the circumstances" shows the existence of a conspiracy, plaintiff has not ferreted out one single fact from which it could be reasonably inferred that Dr. Levine conspired and agreed with others to violate plaintiff's civil rights. All that he is shown is that Dr. Levine rendered an expert opinion, and indeed, on the current state of the record, an unassailed and unassailable expert opinion - and nothing more. That is hardly the sort of circumstantial evidence that precludes brevis disposition, and defendant Levine is clearly entitled to judgment as a matter of law on Count VI.

V. The Defamation Claim (Count X)

In Count X, plaintiff brings a pendent state law defamation claim against the defendant Levine. Under controlling Massachusetts law, to make out a claim for defamation, a plaintiff must allege and be able to prove, among other things, that a

defendant published a false and defamatory statement. *E.g.*, *Zortman v. Bildman*, 1999 WL 1318959 *14 (Mass.Super. 1999).[151]

On this, plaintiff simply says (Plaintiff's Opposition, 17-18):

> Plaintiff concedes that Dr. Levine never spoke directly to the news media. However, his verbal statement to Trooper McDonald was the equivalent of saying that Ed Burke murdered Irene Kennedy...His publication of phony opinions to the police and prosecutors is sufficient to allow the count to go forward at this time. He was part of a team who defamed the plaintiff and is jointly and severally liable.

For one thing, of course, there is no evidence whatsoever that plaintiff published his opinion within the meaning of *Zortman v. Bildman*. For another, of course, plaintiff has not shown, and cannot show, that the opinion rendered by Dr. Levine was false within the meaning of *Zortman v. Bildman*.

But most importantly, and dispositively, under controlling Massachusetts law, the rendering of the opinion by Dr. Levine to Trooper McDonald in the course of the ongoing murder investigation was and is absolutely privileged. In *Correllas v. Vivieros*, 410 Mass. 314, 572 N.E.2d 7, 10-11 (1991), the Supreme Judicial Court concluded:

> Viveiros, however, admitted in her affidavit to making arguably defamatory statements to the police officer and the prosecutor during the course of the investigation of the crime, prior to the institution of formal judicial proceedings. The officers were interrogating Viveiros during their investigation of the theft. She was a suspect in that crime. Viveiros told the officers that she and Correllas had planned to steal money from the vault, that she had taken $4,000 and assumed that the additional $4,000 was stolen by Correllas pursuant to their plan. Correllas testified at her criminal trial that

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[151] There that court observed (Id.):

> The elements of a defamation claim include (1) a false and defamatory communication (2) of and concerning the plaintiff which is (3) published or shown to a third party." Dorn v. Astra USA, 975 F.Supp. 388, 396 (D.Mass.1997), citing McAvoy v. Shufrin, 401 Mass. 593, 597, 518 N.E.2d 513 (1988). (Emphasis added).

she had neither stolen any money nor ever discussed with Viveiros the prospect of taking money from the vault. If a jury were to believe Correllas, they could conclude that Viveiros intentionally lied to police when she made the accusations. We are asked to decide whether these statements are absolutely privileged. We hold that they are.

It is well established that statements made by a witness or party during trial, if "pertinent to the matter in hearing," are protected with an absolute privilege against an action for defamation. See *Aborn v. Lipson,* 357 Mass. 71, 72, 256 N.E.2d 442 (1970); *Mezullo v. Maletz,* 331 Mass. 233, 236, 118 N.E.2d 356 (1954); *Sheppard v. Bryant,* 191 Mass. 591, 592, 78 N.E. 394 (1906); *Laing v. Mitten,* 185 Mass. 233, 235, 70 N.E. 128 (1904). Important policy reasons underpin this long-standing rule. An absolute privilege is favored because any final judgment may depend largely on the testimony of the party or witness, and full disclosure, in the interests of justice, should not be hampered by fear of an action for defamation. See Restatement (Second) of Torts, § 588 comment a (1977). "[I]t is more important that witnesses be free from the fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy." *Aborn, supra* 357 Mass. at 72, 256 N.E.2d 442. A conditional or qualified privilege does not adequately protect a witness or party because he or she may still have to go to court to prove the absence of malice or recklessness. "[T]he privilege would afford small comfort ... if there was a possibility that [the witness] would be subjected in every instance to an inquiry as to his motives." *Mezullo, supra* 331 Mass. at 237, 118 N.E.2d 356.

An absolute privilege, and the policy considerations supporting it, may, in appropriate circumstances, apply to statements made before trial. Under Massachusetts law, statements made to police or prosecutors prior to trial are absolutely privileged if they are made in the context of a proposed judicial proceeding. See *Sriberg v. Raymond,* 370 Mass. 105, 108, 345 N.E.2d 882 (1976); *Kipp v. Kueker,* 7 Mass.App.Ct. 206, 210-212, 386 N.E.2d 1282 (1979); J.R. Nolan & L.J. Sartorio, Tort Law § 130, at 196-197 (1989). See also Restatement (Second) of Torts, *supra* at §§ 587, 588 & 598 comment e; W. Prosser & W. Keeton, Torts § 114, at 819-820 (5th ed. 1984). (Emphasis added).

In this case, the holding and rationale of the *Correllas* court ends the matter. It cannot be gainsaid - and plaintiff does not even suggest to the contrary - that Dr. Levine rendered his report, issued his opinion, at the request of the Norfolk District Attorney's

office,[152] in the context of a proposed judicial proceedings as defined in *Correllas*.[153] He is absolutely immune from suit for defamation, regardless of his supposed motives, malice or no malice,[154] and judgment must enter in favor of defendant Levine on Count X.[155]

VI. The Intentional Infliction of Emotional Stress Claim (Count XIV)

In Count XIV, plaintiff alleges that the conduct of Dr. Levine amounted to intentional infliction of emotional distress, for which he is entitled to damages.

This count, insofar as this court determined, is based on plaintiff's consistent theme that Dr. Levine, by providing a false opinion concerning the origin of the bite marks, intentionally caused him emotional distress.

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[152] The *Correllas* court concluded that absolute immunity was not available when an actor volunteered (and published) information of which the authorities would not have known but for the initiative of the actor. *Correllas*, at 322-23. Instead, in those cases, the actor was entitled to assert a qualified immunity defense. In this case, however, it is clear that Dr. Levine did not initiate the investigation, and that his participation was solely at the behest of the district attorney's office.

[153] In *Briscoe v. LaHue*, 460 U.S. 325 (1983), and *Malley v. Briggs*, 475 U.S. 335 (1986), the Court seemingly bounded the litigation immunity rule to adversarial proceedings. But those cases were decided in the context of Section 1983 claims under federal law, and the Court observed that Section 1983, on its face, allowed for no immunities, absolute or otherwise. Those holdings, of course, have no effect on the applicability and scope of the immunity under state law.

[154] In this court's report and recommendation (# 231) on motions to dismiss filed by defendants Crowley, Kessler, and Evans, on May 15, 2003, adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, G.L. c. 12, § 11H), this court recommended dismissal of the defamation count brought against defendant Crowley for want of any meaningful allegation that defendant Crowley published any false statement, or caused any false statement to be published In that report and recommendation, this court did not recommend dismissal of the defamation count - or the other state law intentional tort claims - based on the absolute privilege. But that was because defendant Crowley did not advance the argument there. Indeed, even in a motion for reconsideration filed by defendant Crowley relating to the intentional tort claims - a motion currently pending before this court and scheduled for oral argument - no claim of absolute immunity is made.

[155] The policy reasons advanced by the *Correllas* Court, are, this court's view, peculiarly applicable to those cases where, as here, law enforcement officers reach out to experts in the private sector for assistance in solving crimes. It cannot be fairly gainsaid that, given the complexities of the evolving forensic sciences, local law enforcement officers are unable - on account of budgetary restraints and the inability to recruit qualified experts to employment in the public sector - to keep pace with those forensics in house, so to speak. The necessities of economics and otherwise require that those authorities, where deemed appropriate, seek the expertise of those in the private sector. But if the privilege did not apply, there would be few in the private sector who would dare respond to such a request - lest their rendering of an opinion result in their being on the south side of a law suit.

Under settled precedent in Massachusetts, to make out a claim of intentional infliction of emotional distress, a plaintiff must show four elements, to wit: (1) that defendant Levine "intended to inflict emotional distress or that [he] knew or should have known that emotional distress was the likely result of [his] conduct;" (2) that defendant Levine's "conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community;" (3) that defendant Levine actions... were the cause of plaintiff's distress;" and (4) that "the emotional distress plaintiff sustained ... was severe and of a nature that no reasonable [person] could be expected to endure it." *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-45 (1976) (internal citations and quotations omitted).

For one thing, even if plaintiff could make out the traditional elements of an intentional infliction of emotional distress claim (which he cannot), the same absolute privilege which precludes suit against defendant Levine for defamation likewise precludes suit against the defendant Levine for intentional infliction of emotional distress under Massachusetts law. Indeed, that was the precise holding in *Correllas*, *supra*, where that Court held (*Id.* 572 N.E.2d at 13):

> Because the statements which form the basis of Correllas's claim for intentional infliction of emotional distress were made in circumstances rendering them absolutely privileged, that claim must also fail. A privilege which protected an individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort. Summary judgment on the intentional infliction of the claim for emotional distress was properly entered. (Emphasis added).

See also, *Yohe v. Nugent*, 321 F.3d 35, 44-45 (1st Cir. 2003); Nelson *v. Community Newspaper Co., Inc.*, 2000 WL 1473109 (Mass.Super. 2000). Thus, Dr. Levine is

absolutely immune from suit, again notwithstanding his supposed motives, on the intentional infliction of emotional distress claim.

And in any event, in this case, for the reasons set forth above, plaintiff, on the basis of the current summary judgment record, has not established - and cannot establish - the elements of a claim of intentional infliction of emotional distress. The sole basis for the intentional infliction of emotional distress claim is the opinion rendered by Dr. Levine at the behest of the local authorities, which opinion plaintiff says is false. For the reasons set forth above, however, plaintiff has not, and cannot, show that that opinion was false. And there is not a shred of evidence that Dr. Levine, in rendering that opinion, intended to inflict emotional distress on the plaintiff. Defendant Levine is entitled to summary judgment *vis a vis* the intentional infliction of emotional distress claim.

VII. The False Imprisonment Claim (Count VIII)

In Count VIII, plaintiff asserts a pendent state law claim of false imprisonment against Dr. Levine. The basis for the claimed liability is precisely the same as that set forth for liability under Sections 1983 and the Massachusetts Declaration of Rights - basis which this court has rejected for the reasons set forth in Part II of this Report and Recommendation.

Once again, however, this court concludes, for the reasons set forth in Parts IV and V of this Report and Recommendation, that defendant Levine is absolutely immune from a state law claim for false imprisonment. Although no Massachusetts court has, insofar as this court can determine, directly addressed this issue of immunity *vis a vis* a false imprisonment claim, that much is apparent from the holding of the Massachusetts Supreme Judicial Court in *Correllas*, *supra*, where it held (*Id.* 572 N.E.2d at 13):

> Because the statements which form the basis of Correllas's claim for intentional infliction of emotional distress were made in circumstances rendering them absolutely privileged, that claim must also fail. A privilege which protected an individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort. Summary judgment on the intentional infliction of the claim for emotional distress was properly entered. (Emphasis added).

From that which was expressly said in *Correllas*, this court finds and concludes that the Massachusetts courts, if presented with the issue straight up, would conclude that the absolute privilege applies to false imprisonment claims as well.

And in any event, for the same reasons set forth with respect to plaintiff's civil rights claims, that is, because plaintiff has not made, and cannot make, a showing that Dr. Levine's opinion was false or that plaintiff's arrest was without probable cause, plaintiff cannot make out a claim of false imprisonment. Defendant Levine is entitled to summary judgment *vis a vis* Count VIII.

VIII. The Malicious Prosecution Claim (Count IX)

In Count IX, plaintiff brings a pendent state law malicious prosecution claim against the defendant Levine. Under settled Massachusetts law, to make out a claim for malicious prosecution, a plaintiff must show:

> "(1) the institution of criminal process against the plaintiff with malice; and (2) without probable cause; and (3) the termination of the criminal proceeding in favor of the plaintiff." J.R. Nolan & L.J. Sartorio, Tort Law § 77, at 88 (2d ed.1989).

See also Beecy v. Pucciarelli, 387 Mass. 589, 593, 441 N.E.2d 1035 (1982); *Gutierrez v. Massachusetts Bay Transportation Authority*, 437 Mass. 396, 772 N.E.2d 552, 562 (2002).

Plaintiff has failed to establish any triable issue on this count. All that he says (Plaintiff's Opposition, pp. 18-19) is that:

> Levine knew or should have known that the making of a false statement to McDonald was the same as instituting prosecution. A count for malicious prosecution against Dr. Levine has merit.

Once again, however, the malicious prosecution claim is bottomed solely on the opinion rendered by Dr. Levine at the behest of the authorities, and, for the reasons set forth above with respect to the state law claims of defamation, intentional infliction of emotional distress, and false arrest, Dr. Levine is absolutely immune from suit on a claim of malicious prosecution.

And in any event, the undisputed material facts show no such thing. For one thing, Dr. Levine testified, at plaintiff's behest, that, when he rendered his opinion, he was unaware that the authorities were seeking a warrant for plaintiff's arrest based solely on his report. See Part I.6, above. For another, the opinion which he rendered was not, as indicated above, false. And yet, for another, a prosecution initiated with prosecution with probable cause defeats any claim for malicious prosecution, since the "`want of probable cause is a vital and indispensable element of the plaintiff's case.'" *Wynne v. Rosen*, 391 Mass. 797, 802, 802 (1984), quoting from *Good v. French*, 115 Mass. 201, 203 (1874). Given all that was presented to the magistrate clerk who issued the arrest warrant, see Part I.8 and note 14, *supra*, it is clear beyond peradventure that there was probable cause to believe that the plaintiff had murdered Irene Kennedy, and no reasonable trier of fact could conclude otherwise. Plaintiff has not made, and cannot make, a triable issue *vis a vis* the

malicious prosecution claim, and defendant Levine is entitled to summary judgment on Count IX.

IX. The Professional Malpractice Claim (Count XII)

In Count XII, plaintiff generally alleges that, inasmuch as defendant Levine allegedly fabricated forensic evidence against him, he is liable to him for professional malpractice.

In the circumstances, plaintiff cannot make out a claim for malpractice. Among other things, to establish a claim for malpractice, the plaintiff must show the existence of a physician-patient relationship between the plaintiff and defendant Levine, and that, in the course of that relationship, the defendant breached a duty arising under that relationship. E.g., Mitchell v. United States, 141 F.3d 8, 13 (1st Cir. 1998).[156] Plaintiff has not even pleaded, and he surely cannot show, the existence of that physician-patient relationship. Given that, defendant Levine is entitled to summary judgment on this count.

X. The Invasion of Privacy Claim (Count XVI)

In Count XVI, plaintiff generally alleges that "all defendants", including, presumably, Levine as well, caused private facts about the plaintiff to be published throughout the community, in an attempt to make out a claim of invasion of privacy under Massachusetts law.

For one thing, not unlike the defamation claim, defendant Levine is absolutely immune from suit on this state law invasion of privacy claim for precisely the same reasons

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[156] "Under Massachusetts tort law, a plaintiff in a medical malpractice suit bears the burden of proving by a preponderance of the evidence that a physician-patient relationship existed between the physician and the injured party, that the physician breached his or her duty of care, and that the breach was the proximate cause of the injury. See Blood v. Lea, 403 Mass. 430, 530 N.E.2d 344, 347 (1988); see also Poyser v. United States, 602 F.Supp. 436, 438 (D.Mass.1984); Berardi v. Menicks, 340 Mass. 396, 164 N.E.2d 544, 546 (1960)." (Emphasis added).

set forth above with respect to the defamation count and the other state law claims sounding in intentional tort.

Moreover, among other things, in order to make out an invasion of privacy claim, a plaintiff must show, not unlike a claim for defamation, that the defendant "published" the alleged private facts. *Dorn v. Astra USA*, 975 F.Supp. 388, 396 (D.Mass.1997). In this case, plaintiff does not even allege that Dr. Levine "published" any facts - much less private facts. Indeed, in his opposition (# 225), plaintiff makes no argument whatsoever on the invasion of privacy count. For that reason, and for the reason that plaintiff has not shown any facts whatsoever indicating a publication on the part of Dr. Levine, plaintiff has not made out a triable issue of fact *vis a vis* an invasion of privacy claim against Dr. Levine. Defendant Levine is accordingly entitled to summary judgment on that claim and Count XVI.

XI. Conclusion

For the reasons set forth above, this court recommends[157] that the district judge to whom this case is assigned allow defendant Levine's Motion to Dismiss and/or for Summary Judgment (# 15 in Civil Action No. 00-10384-GAO, # 214 in Civil Action No. 00-10376-GAO) in all respects.

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[157] The parties are hereby advised that under the provisions of Rule 72(b) of the Federal Rules of Civil Procedure and Rule 3(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file specific and written objections thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); United States v. Emiliano Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-379 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also, Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466 (1985).

UNITED STATES MAGISTRATE JUDGE